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No. 85-1090

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM H. HUDNUT, III, Mayor of the City of Indianapolis, Indiana, et al.,

Appellants

vs.

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al.,

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-3147

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al.,
Plaintiffs-Appellees,

v.

WILLIAM H. HUDNUT, III, Mayor, City of Indianapolis, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 84 C 791 — **Sarah Evans Barker**, *Judge.*

ARGUED JUNE 4, 1985 — DECIDED AUGUST 27, 1985

Before CUDAHY AND EASTERBROOK, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge.*

EASTERBROOK, *Circuit Judge.* Indianapolis enacted an ordinance defining "pornography" as a practice that discriminates against women. "Pornography" is to be redressed through the administrative and judicial methods used for other discrimination. The City's definition of "pornography" is considerably different from "obscenity," which the Supreme Court has held is not protected by the First Amendment.

To be "obscene" under *Miller v. California*, 413 U.S. 15 (1973), "a publication must, taken as a whole, appeal to the

prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value." *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794, 2800 (1985). Offensiveness must be assessed under the standards of the community. Both offensiveness and an appeal to something other than "normal, healthy sexual desires" (*Brockett, supra*, at 2799) are essential elements of "obscenity."

"Pornography" under the ordinance is "the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

> (1) Women are presented as sexual objects who enjoy pain or humiliation; or
>
> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
>
> (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
>
> (4) Women are presented as being penetrated by objects or animals; or
>
> (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
>
> (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display."

Indianapolis Code §16-3(q). The statute provides that the "use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section." The ordinance as passed in April 1984 defined "sexually explicit" to mean actual or simulated intercourse or the uncovered exhibition of the genitals, buttocks or anus. An amendment in June 1984 deleted this provision, leaving the term undefined.

The Indianapolis ordinance does not refer to the prurient interest, to offensiveness, or to the standards of the community. It demands attention to particular depictions, not to the work judged as a whole. It is irrelevant under the ordinance whether the work has literary, artistic, political, or scientific value. The City and many amici point to these omissions as virtues. They maintain that pornography influences attitudes, and the statute is a way to alter the socialization of men and women rather than to vindicate community standards of offensiveness. And as one of the principal drafters of the ordinance has asserted, "if a woman is subjected, why should it matter that the work has other value?" Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. Civ. Rts. — Civ. Lib. L. Rev. 1, 21 (1985).

Civil rights groups and feminists have entered this case as amici on both sides. Those supporting the ordinance say that it will play an important role in reducing the tendency of men to view women as sexual objects, a tendency that leads to both unacceptable attitudes and discrimination in the workplace and violence away from it. Those opposing the ordinance point out that much radical feminist literature is explicit and depicts women in ways forbidden by the ordinance and that the ordinance would reopen old battles. It is unclear how Indianapolis would treat works from James Joyce's *Ulysses* to Homer's *Iliad*; both depict women as submissive objects for conquest and domination.

We do not try to balance the arguments for and against an ordinance such as this. The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way — in sexual encounters "premised on equality" (MacKinnon, *supra*, at 22) — is lawful no matter how sexually explicit. Speech treating women in the disapproved way — as submissive in matters sexual or as enjoying humiliation — is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.

I

The ordinance contains four prohibitions. People may not "traffic" in pornography, "coerce" others into performing in pornographic works, or "force" pornography on anyone. Anyone injured by someone who has seen or read pornography has the right of action against the maker or seller.

Trafficking is defined in §16-3(g)(4) as the "production, sale, exhibition, or distribution of pornography." The offense excludes exhibition in a public or educational library, but a "special display" in a library may be sex discrimination. Section 16-3(g)(4)(C) provides that the trafficking paragraph "shall not be construed to make isolated passages or isolated parts actionable."

"Coercion into pornographic performance" is defined in §16-3(g)(5) as "[c]oercing, intiminating or fradulently inducing any person ... into performing for pornography...." The ordinance specifies that proof of any of the following "shall not constitute a defense: I. That the person is a woman; ... VI. That the person has previously posed for sexually explicit pictures ... with anyone ...; ... VIII. That the person actually consented to a use of the per-

formance that is changed into pornography; . . . IX. That the person knew that the purpose of the acts or events in question was to make pornography; . . . XI. That the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; XII. That no physical force, threats, or weapons were used in the making of the pornography; or XIII. That the person was paid or otherwise compensated."

"Forcing pornography on a person," according to §16-3(g)(5), is the "forcing of pornography on any woman, man, child, or transsexual in any place of employment, in education, in a home, or in any public place." The statute does not define forcing, but one of its authors states that the definition reaches pornography shown to medical students as part of their education or given to language students for translation. MacKinnon, *supra*, at 40-41.

Section 16-3(g)(7) defines as a prohibited practice the "assault, physical attack, or injury of any woman, man, child, or transsexual in a way that is directly caused by specific pornography."

For purposes of all four offense, it is generally "not . . . a defense that the respondent did not know or intend that the materials were pornography . . . ." Section 16-3(g)(8). But the ordinance provides that damages are unavailable in trafficking cases unless the complainant proves "that the respondent knew or had reason to know that the materials were pornography." It is a complete defense to a trafficking case that all of the materials in question were pornography only by virtue of category (6) of the definition of pornography. In cases of assault caused by pornography, those who seek damages from "a seller, exhibitor or distributor" must show that the defendant knew or had reason to know of the material's status as pornography. By implication, those who seek damages from an author need not show this.

A woman aggrieved by trafficking in pornography may file a complaint "as a woman acting against the subordination of women" with the office of equal opportunity. Section 16-17(b). A man, child, or transsexual also may protest trafficking "but must prove injury in the same way that a woman is injured...." *Ibid.* Subsection (a) also provides, however, that "any person claiming to be aggrieved" by trafficking, coercion, forcing, or assault may complain against the "perpetrators." We need not decide whether §16-17(b) qualifies the right of action in §16-17(a).

The office investigates and within 30 days makes a recommendation to a panel of the equal opportunity advisory board. The panel then decides whether there is reasonable cause to proceed (§16-24(2)) and may refer the dispute to a conciliation conference or to a complaint adjudication committee for a hearing (§§16-24(3), 16-26(a)). The committee uses the same procedures ordinarily associated with civil rights litigation. It may make findings and enter orders, including both orders to cease and desist and orders "to take further affirmative action ... including but not limited to the power to restore complainant's losses...." Section 16-26(d). Either party may appeal the committee's decision to the board, which reviews the record before the committee and may modify its decision.

Under Indiana law an administrative decision takes effect when rendered, unless a court issues a stay. Ind. Stat. §4-22-1-13. The Board's decisions are subject to review in the ordinary course. Ind. Stat. §4-22-1-14. Judicial review in pornography cases is to be de novo, Indianapolis Code §16-27(e), which provides a second complete hearing. When the board finds that a person has engaged in trafficking or that a seller, exhibitor, or distributor is responsible for an assault, it must initiate judicial review of its own decision, *ibid.*, and the statute prohibits injunctive relief in these cases in advance of the court's final decision. (This is unlike the usual procedure under state law, which permits

summary enforcement. Ind. Stat. §§4-22-1-18 and 4-22-1-27.)

The district court held the ordinance unconstitutional. 598 F. Supp. 1316 (S.D. Ind. 1984). The court concluded that the ordinance regulates speech rather than the conduct involved in making pornography. The regulation of speech could be justified, the court thought, only by a compelling interest in reducing sex discrimination, an interest Indianapolis had not established. The ordinance is also vague and overbroad, the court believed, and establishes a prior restraint of speech.

II

The plaintiffs are a congeries of distributors and readers of books, magazines, and films. The American Booksellers Association comprises about 5,200 bookstores and chains. The Association for American Publishers includes most of the country's publishers. Video Shack, Inc., sells and rents video cassettes in Indianapolis. Kelly Bentley, a resident of Indianapolis, reads books and watches films. There are many more plaintiffs. Collectively the plaintiffs (or their members, whose interests they represent) make, sell, or read just about every kind of material that could be affected by the ordinance, from hard-core films to W.B. Yeats's poem "Leda and the Swan" (from the myth of Zeus in the form of a swan impregnating an apparently subordinate Leda), to the collected works of James Joyce, D.H. Lawrence, and John Cleland.

The interests of Bentley and many of the members of the organizational plaintiffs are directly affected by the ordinance, which gives them standing to attack it. *Buckley v. Valeo*, 424 U.S. 1, 11-12 & n.10 (1976). There is no need to invoke the special standing rules applicable to overbroad laws that affect speech, see *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); Henry P. Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1.

The district court prevented the ordinance from taking effect. The expedition with which this suit was filed raises questions of ripeness and abstention. Ripeness is a prudential question, see *Buckley, supra*, 424 U.S. at 113-18; *Thomas v. Union Carbide Agricultural Products Co.*, 105 S. Ct. 3325, 3332-34 (1985). A case is not ripe if the issues are still poorly formed or the application of the statute is uncertain. A challenge may be ripe, however, even when the statute is not yet effective. *Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d 497, 500 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). The statute challenged in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), had an effective date two years in the future, yet the Court found the suite ripe. Here, as in *Pierce*, the dispute may be resolved without reference to the administration of the statute. We gain nothing by waiting. Time would take a toll, however, on the speech of the parties subject to the act. They must take special care not to release material that might be deemed pornographic, for that material could lead to awards of damages. Deferred adjudication would produce tempered speech without assisting in resolution of the controversy.

It is also inappropriate to abstain under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). Abstention is appropriate when state courts may clarify the meaning of a statute, thus sharpening the constitutional dispute and perhaps preventing an unnecessary constitutional adjudication. This statute, however, is all too clear. Cf. *Mazanec v. North Judson — San Pierre School Corp.*, 763 F.2d 845, 848 (7th Cir. 1985). A state court could not construe this ordinance as an "ordinary" obscenity law; another law serves that function. Ind. Stat. §35-49-1-1 et seq. It is designed to be distinctively different, to prohibit explicitly sexual speech that "subordinates" women in specified ways. If abstention was unnecessary in *Brockett*, despite the argument (which convinced the Chief Justice and Justices Rehnquist and O'Connor, see 105 S. Ct. at 2804-05) that a state court could save the statute by excising

or construing a single element of the definition of obscenity, it surely is unnecessary here, for it is the structure of the statute rather than the meaning of any one of its terms that leads to the constitutional problem.

III

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious — the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious belief may prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful.

The ideas of the Klan may be propagated. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Communists may speak freely and run for office. *DeJonge v. Oregon*, 299 U.S. 353 (1937). The Nazi Party may march through a city with a large Jewish population. *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). People may criticize the President by misrepresenting his positions, and they have a right to post their misrepresentations on public property. *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984) (Bork, J.). People may teach religions that others despise. People may seek to repeal laws guaranteeing equal opportunity in employment or to revoke the constitutional amendments granting the vote to blacks and women. They may do this because

"above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas...." *Police Department v. Mosley*, 408 U.S. 92, 95 (1972). See also Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 William & Mary L. Rev. 189 (1983); Paul B. Stephan, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203, 233-36 (1982).

Under the ordinance graphic sexually explicit speech is "pornography" or not depending on the perspective the author adopts. Speech that "subordinates" women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in "positions of servility or submission or display" is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an "approved" view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.

Indianapolis justifies the ordinance on the ground that pornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so. Pornography is an aspect of dominance.[1] It does not per-

[1] "Pornography constructs what a woman is in terms of its view of what men want sexually.... Pornography's world of equality is a harmonious and balanced place. Men and women are perfectly complementary and perfectly bipolar. ... All the ways men love to take and violate women, women love to be taken and violated. ... What pornography *does* goes beyond its content: It eroticizes hierarchy, it sexualizes inequality. It makes dominance and submission sex. Inequality is its central dynamic; the illusion of freedom coming together with the reality of force is central to its

(Footnote continued on following page)

suade people so much as change them. It works by socializing, by establishing the expected and the permissible. In this view pornography is not an idea; pornography is the injury.

There is much to this perspective. Beliefs are also facts. People often act in accordance with the images and patterns they find around them. People raised in a religion tend to accept the tenents of that religion, often without independent examination. People taught from birth that black people are fit only for slavery rarely rebelled against that creed; beliefs coupled with the self-interest of the masters established a social structure that inflicted great harm while enduring for centuries. Words and images act at the level of the subconscious before they persuade at the level of the conscious. Even the truth has little chance unless a statement fits within the framework of beliefs that may never have been subjected to rational study.

Therefore we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home,

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(Footnote continued from preceeding page)

working. . . . [P]ornography is neither harmless fantasy nor a corrupt and confused misrepresentation of an otherwise neutral and healthy sexual situation. It institutionalizes the sexuality of male supremacy, fusing the erotization of dominance and submission with the social construction of male and female. . . . Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography . . . is a sexual reality." MacKinnon, *supra*, at 17-18 (note omitted, emphasis in original). See also Andrea Dworkin, *Pornography: Men Possessing Women* (1981). A national commission in Canada recently adopted a similar rationale for controlling pornography. Special Commission on Pornography and Prostitution, 1 *Pornography and Prostitution in Canada* 49-59 (Canadian Government Publishing Centre 1985).

batter and rape on the streets.[2] In the language of the legislature, "[p]ornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds]." Indianapolis Code §16-1(a)(2).

Yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech. Hitler's orations affected how some Germans saw Jews. Communism is a world view, not simply a *Manifesto* by Marx and Engels or a set of speeches. Efforts to suppress communist speech in the United States were based on the belief that the public acceptability of such ideas would increase the likelihood of totalitarian government. Religions affect socialization in

[2] MacKinnon's article collects empirical work that supports this proposition. The social science studies are very difficult to interpret, however, and they conflict. Because much of the effect of speech comes through a process of socialization, it is difficult to measure incremental benefits and injuries caused by particular speech. Several psychologists have found, for example, that those who see violent, sexually explicit films tend to have more violent thoughts. But how often does this lead to actual violence? National commissions on obscenity here, in the United Kingdom, and in Canada have found that it is not possible to demonstrate a direct link between obscenity and rape or exhibitionism. The several opinions in *Miller v. California* discuss the U.S. commission. See also *Report of the Committee on Obscenity and Film Censorship* 61-95 (Home Office, Her Majesty's Stationary Office, 1979); Special Committee on Pornography and Prostitution, 1 *Pornography and Prostitution in Canada* 71-73, 95-103 (Canadian Government Publishing Centre 1985). In saying that we accept the finding that pornography as the ordinance defines it leads to unhappy consequences, we mean only that there is evidence to this effect, that this evidence is consistent with much human experience, and that as judges we must accept the legislative resolution of such disputed empirical questions. See *Gregg v. Georgia*, 428 U.S. 153, 184-87 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

the most pervasive way. The opinion in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), shows how a religion can dominate an entire approach to life, governing much more than the relation between the sexes. Many people believe that the existence of television, apart from the content of specific programs, leads to intellectual laziness, to a penchant for violence, to many other ills. The Alien and Sedition Acts passed during the administration of John Adams rested on a sincerely held belief that disrespect for the government leads to social collapse and revolution — a belief with support in the history of many nations. Most governments of the world act on this empirical regularity, suppressing critical speech. In the United States, however, the strength of the support for this belief is irrelevant. Seditious libel is protected speech unless the danger is not only grave but also imminent. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); cf. *Brandenburg v. Ohio, supra; New York Times Co. v. United States*, 403 U.S. 713 (1971).

Racial bigotry, anti-semitism, violence on television, reporters' biases — these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.

Sexual responses often are unthinking responses, and the association of sexual arousal with the subordination of women therefore may have a substantial effect. But almost all cultural stimuli provoke unconscious responses. Religious ceremonies condition their participants. Teachers convey messages by selecting what not to cover; the implicit message about what is off limits or unthinkable may be more powerful than the messages for which they present rational argument. Television scripts contain unarticulated assumptions. People may be conditioned in subtle ways. If the fact that speech plays a role in a process

of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.

It is possible to interpret the claim that the pornography is the harm in a different way. Indianapolis emphasizes the injury that models in pornographic films and pictures may suffer. The record contains materials depicting sexual torture, penetration of women by red-hot irons and the like. These concerns have nothing to do with written materials subject to the statute, and physical injury can occur with or without the "subordination" of women. As we discuss in Part IV, a state may make injury in the course of producing a film unlawful independent of the viewpoint expressed in the film.

The more immediate point, however, is that the image of pain is not necessarily pain. In *Body Double*, a suspense film directed by Brian DePalma, a woman who has disrobed and presented a sexually explicit display is murdered by an intruder with a drill. The drill runs through the woman's body. The film is sexually explicit and a murder occurs — yet no one believes that the actress suffered pain or died. In *Barbarella* a character played by Jane Fonda is at times displayed in sexually explicit ways and at times shown "bleeding, bruised, [and] hurt in a context that makes these conditions sexual" — and again no one believes that Fonda was actually tortured to make the film. In *Carnal Knowledge* a woman grovels to please the sexual whims of a character played by Jack Nicholson; no one believes that there was a real sexual submission, and the Supreme Court held the film protected by the First Amendment. *Jenkins v. Georgia*, 418 U.S. 153 (1974). And this works both ways. The description of women's sexual domination of men in *Lysistrata* was not real dominance. Depictions may affect slavery, war, or sexual roles, but a book about slavery is not itself slavery, or a book about death by poison a murder.

Much of Indianapolis's argument rests on the belief that when speech is "unanswerable," and the metaphor that there is a "marketplace of ideas" does not apply, the First

Amendment does not apply either. The metaphor is honored; Milton's *Aeropagitica* and John Stewart Mill's *On Liberty* defend freedom of speech on the ground that the truth will prevail, and many of the most important cases under the First Amendment recite this position. The Framers undoubtedly believed it. As a general matter it is true. But the Constitution does not make the dominance of truth a necessary condition of freedom of speech. To say that it does would be to confuse an outcome of free speech with a necessary condition for the application of the amendment.

A power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth. At some point the government must be able to say (as Indianapolis has said): "We know what the truth is, yet a free exchange of speech has not driven out falsity, so that we must now prohibit falsity." If the government may declare the truth, why wait for the failure of speech? Under the First Amendment, however, there is no such thing as a false idea, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), so the government may not restrict speech on the ground that in a free exchange truth is not yet dominant.

At any time, some speech is ahead in the game; the more numerous speakers prevail. Supporters of minority candidates may be forever "excluded" from the political process because their candidates never win, because few people believe their positions. This does not mean that freedom of speech has failed.

The Supreme Court has rejected the position that speech must be "effectively answerable" to be protected by the Constitution. For example, in *Buckley v. Valeo, supra*, 424 U.S. at 39-54, the Court held unconstitutional limitations on expenditures that were neutral with regard to the speakers' opinions and designed to make it easier for one person to answer another's speech. See also *FEC v. National Conservative PAC*, 105 S. Ct. 1459 (1985). In *Mills v.*

Alabama, 384 U.S. 214 (1966), the Court held unconstitutional a statute prohibiting editorials on election day — a statute the state had designed to prevent speech that came too late for answer. In cases from *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), through *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Court has held that the First Amendment protects political stratagems — obtaining legislation through underhanded ploys and outright fraud in *Noerr*, obtaining political and economic ends through boycotts in *Claiborne Hardware* — that may be beyond effective correction through more speech.

We come, finally, to the argument that pornography is "low value" speech, that it is enough like obscenity that Indianapolis may prohibit it. Some cases hold that speech far removed from politics and other subjects at the core of the Framers' concerns may be subjected to special regulation. E.g., *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67-70 (1976) (plurality opinion); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). These cases do not sustain statutes that select among viewpoints, however. In *Pacifica* the FCC sought to keep vile language off the air during certain times. The Court held that it may; but the Court would not have sustained a regulation prohibiting scatalogical descriptions of Republicans but not scatological descriptions of Democrats, or any other form of selection among viewpoints. See *Planned Parenthood Ass'n v. Chicago Transit Authority*, No. 84-2518 (7th Cir. July 12, 1985), slip op. 13-14.

At all events, "pornography" is not low value speech within the meaning of these cases. Indianapolis seeks to prohibit certain speech because it believes this speech influences social relations and politics on a grand scale, that it controls attitudes at home and in the legislature. This precludes a characterization of the speech as low

value. True, pornography and obscenity have sex in common. But Indianapolis left out of its definition any reference to literary, artistic, political, or scientific value. The ordinance applies to graphic sexually explicit subordination in works great and small.[3] The Court sometimes balances the value of speech against the costs of its restriction, but it does this by category of speech and not by the content of particular works. See John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Strange Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81 (1978). Indianapolis has created an approved point of view and so loses the support of these cases.

Any rationale we could imagine in support of this ordinance could not be limited to sex discrimination. Free speech has been on balance an ally of those seeking change. Governments that want stasis start by restricting speech. Culture is a powerful force of continuity; Indianapolis paints pornography as part of the culture of power. Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is.

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[3] Indianapolis briefly argues that *Beauharnais v. Illinois*, 343 U.S. 250 (1952), which allowed a state to penalize "group libel," supports the ordinance. In *Collin v. Smith*, *supra*, 578 F.2d at 1205, we concluded that cases such as *New York Times v. Sullivan* had so washed away the foundations of *Beauharnais* that it could not be considered authoritative. If we are wrong in this, however, the case still does not support the ordinance. It is not clear that depicting women as subordinate in sexually explicit ways, even combined with a depiction of pleasure in rape, would fit within the definition of a group libel. The well received film *Swept Away* used explicit sex, plus taking pleasure in rape, to make a political statement, not to defame. Work must be an insult or slur for its own sake to come within the ambit of *Beauharnais*, and a work need not be scurrilous at all to be "pornography" under the ordinance.

IV

The definition of "pornography" is unconstitutional. No construction or excision of particular terms could save it. The offense of trafficking in pornography necessarily falls with the definition. We express no view on the district court's conclusions that the ordinance is vague and that it establishes a prior restraint. Neither is necessary to our judgment. We also express no view on the argument presented by several amici that the ordinance is itself a form of discrimination on account of sex.

Section 8 of the ordinance is a strong severability clause, and Indianapolis asks that we parse the ordinance to save what we can. If a court could do this by surgical excision, this might be possible. *Zbaraz v. Hartigan*, 763 F.2d 1532, 1545 (7th Cir. 1985). But a federal court may not completely reconstruct a local ordinance, and we conclude that nothing short of rewriting could save anything.

The offense of coercion to engage in a pornographic performance, for example, has elements that might be constitutional. Without question a state may prohibit fraud, trickery, or the use of force to induce people to perform — in pornographic films or in any other films. Such a statute may be written without regard to the viewpoint depicted in the work. *New York v. Ferber*, 458 U.S. 747 (1982), suggests that when a state has a strong interest in forbidding the conduct that makes up a film (in *Ferber* sexual acts involving minors), it may restrict or forbid dissemination of the film in order to reinforce the prohibition of the conduct. A state may apply such a rule to non-sexual coercion (although it need not). We suppose that if someone forced a prominent political figure, at gunpoint, to endorse a candidate for office, a state could forbid the commercial sale of the film containing that coerced endorsement. The same principal allows a court to enjoin the publication of stolen trade secrets and award damages for the publication of copyrighted matter without permission. See *Harper & Row, Publishers, Inc. v. Nation*

Enterprises, 105 S. Ct. 2218 (1985). Cf. *Snepp v. United States*, 444 U.S. 507, 509 & n.3 (1980).

But the Indianapolis ordinance, unlike our hypothetical statute, is not neutral with respect to viewpoint. The ban on distribution of works containing coerced performances is limited to pornography; coercion is irrelevant if the work is not "pornography," and we have held the definition of "pornography" to be defective root and branch. A legislature might replace "pornography" in §16-3(g)(4) with "any film containing explicit sex" or some similar expression, but even the broadest severability clause does not permit a federal court to rewrite as opposed to excise. Rewriting is work for the legislature of Indianapolis. Cf. *Stanton v. Stanton*, 421 U.S. 7 (1975); *Califano v. Westcott*, 443 U.S. 76 (1979).

The offense of forcing pornography on unwilling recipients is harder to assess. Many kinds of forcing (such as giving texts to students for translation) may themselves be protected speech. *Rowan v. Post Office*, 397 U.S. 728 (1970), shows that a state may permit people to insulate themselves from categories of speech — in *Rowan* sexual mail — but that the government must leave the decision about what items are forbidden in the hands of the potentially offended recipients. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (the government may not define for itself a category of constitutionally protected but sexual speech that may not be mailed). Exposure to sex is not something the government may prevent, see *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). We therefore could not save the offense of "forcing" by redefining "pornography" as all sexually-offensive speech or some related category. The statute needs a definition of "forcing" that removes the government from the role of censor. See also *Planned Parenthood Ass'n, supra*, holding that the "captive audience" problem does not permit a government to discriminate on account of the speaker's message.

The section creating remedies for injuries and assaults attributable to pornography also is salvageable in principle, although not by us. The First Amendment does not prohibit redress of all injuries caused by speech. Injury to reputation is redressed through the law of libel, which is constitutional subject to strict limitations. Cases such as *Brandenburg v. Ohio* and *NAACP v. Claiborne Hardware* hold that a state may not penalize speech that does not cause immediate injury. But we do not doubt that if, immediately after the Klan's rally in *Brandenburg*, a mob had burned to the ground the house of a nearby black person, that person could have recovered damages from the speaker who whipped the crowd into a frenzy. All of the Justices assumed in *Claiborne Hardware* that if the threats in Charles Evers's incendiary speech had been a little less veiled and had led directly to an assault against a person shopping in a store owned by a white merchant, the victim of the assault and even the merchant could have recovered damages from the speaker.

The law of libel has the potential to muzzle the press, which led to *New York Times v. Sullivan*. See also *Ollman v. Evans*, 750 F.2d 970, 994-98 (D.C. Cir. 1984) (en banc) (Bork, J., concurring). A law awarding damages for assaults caused by speech also has the power to muzzle the press, and again courts would place careful limits on the scope of the right. Certainly no damages could be awarded unless the harm flowed directly from the speech and there was an element of intent on the part of the speaker, as in *Sullivan* and *Brandenburg*.

Much speech is dangerous. Chemists whose work might help someone build a bomb, political theorists whose papers might start political movements that lead to riots, speakers whose ideas attract violent protesters, all these and more leave loss in their wake. Unless the remedy is very closely confined, it could be more dangerous to speech than all the libel judgments in history. The constitutional requirements for a valid recovery for assault caused by

speech might turn out to be too rigorous for any plaintiff to meet.[4] But the Indianapolis ordinance requires the complainant to show that the attack was "directly caused by specific pornography" (§16-3(g)(7)), and it is not beyond the realm of possibility that a state court could construe this limitation in a way that would make the statute constitutional. We are not authorized to prevent the state from trying.

Again, however, the assault statute is tied to "pornography," and we cannot find a sensible way to repair the defect without seizing power that belongs elsewhere. Indianapolis might choose to have no ordinance if it cannot be limited to viewpoint-specific harms, or it might choose to extend the scope to all speech, just as the law of libel applies to all speech. An attempt to repair this ordinance would be nothing but a blind guess.

No amount of struggle with particular words and phrases in this ordinance can leave anything in effect. The district court came to the same conclusion. Its judgment is therefore

AFFIRMED

SWYGERT, *Senior Circuit Judge*, concurring. I concur in Parts I, II, and III of the court's opinion except for the following strictures. Although raised in the district court, neither ripeness nor abstention was made an issue on appeal. Given that fact, I believe both are pseudo-issues and this court need not treat them *sua sponte*. True, some of the intervenors have discussed abstention in their briefs; but we are without the benefit of the views of the real parties at interest in this case on either issue. More importantly, a discussion and resolution of these issues are quite unnecessary to the disposition of this appeal.

[4] See, e.g., *Zamora v. CBS*, 480 F. Supp. 199 (S.D. Fla. 1979), among the many cases concluding that particular plaintiffs could not show a connection sufficiently direct to permit liability consistent with the First Amendment.

I also believe that the majority's questionable and broad assertions regarding how human behavior can be conditioned by certain teachings and believes (*see ante* at 10-12, 13) are unnecessary. For even if this court accepts the City of Indianapolis' basic contention that pornography does condition unfavorable responses to women, the ordinance is still unconstitutional.

As to Part IV of the opinion, I agree that the ordinance is unconstitutional on first amendment grounds and that there is no need to discuss vagueness or prior restraint. I do, however, disassociate myself from the extensive statements with respect to how the Indianapolis City Council could fashion an ordinance dealing with pornography that might pass constitutional muster. Indianapolis has asked us to sever the ordinance and save those parts that are not unconstitutional, if we can. All then that this court is required to do is to rule that the ordinance is not severable. Statements regarding which portions of the ordinance may be constitutional are merely advisory and are not the function of this court.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL.	)	
Plaintiffs,	)	
VS.	)	CAUSE NO. IP 84-791C
WILLIAM H. HUDNUT, III, Mayor of the City of Indianapolis, et al.	)	
Defendants.	)	

JUDGMENT

The Court, having this day filed its Findings of Fact and Conclusions of Law and its Memorandum in the above matter in the following words and figures, to-wit: (H. I.), now, therefore,

IT IS CONSIDERED AND ADJUDGED that Indianapolis City-County General Ordinances Nos. 24 and 35, amending the Human Relations and Equal Opportunity Law appearing in Chapter 16 of the Code of Indianapolis and Marion County, Indiana, are declared to be unconstitutional, void and of no effect.

IT IS FURTHER CONSIDERED AND ADJUDGED that defendants are permanently enjoined from enforcing said Ordinances.

IT IS FURTHER CONSIDERED AND ADJUDGED that judgment shall be entered for plaintiffs. Costs and

reasonable attorneys' fees are assessed against the defendants.

Dated this 19th day of November, 1984.

/s/ Sarah Evans Barker

Sarah Evans Barker, Judge
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL.	)	
Plaintiffs,	)	
VS.	)	CAUSE NO. IP 84-791C
WILLIAM H. HUDNUT, III, Mayor of the City of Indianapolis, et al.	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Court on the June 22, 1984 motion of the plaintiffs for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the issues of their June 20, 1984 second amended complaint and defendants' June 21, 1984 answer thereto. The motion became fully briefed with the filing of the movants' reply on July 11, 1984. Additionally, two *amicus curiae* were permitted to file briefs in this action. On July 30, 1984, oral arguments were presented to the Court, at which time defendants by oral motion recast their opposing brief into a cross-motion for summary judgment, which motion the Court granted.

Based upon the undisputed facts, the parties' and amicus briefs and oral argument of counsel, the Court now submits its findings of fact and conclusions of law. In accordance therewith, plaintiffs' motion for summary judgment is GRANTED and defendants' cross-motion for summary judgment is DENIED, and the challenged Ordinance is declared to be unconstitutional.

Findings of Fact

1. On April 23, 1984, and June 11, 1984, the Indianapolis-Marion County City-County Council (hereinafter "Council") passed General Ordinances No. 24, 1984 and 35, 1984, respectively, which amended the Code of Indianapolis and Marion County, Indiana, Chapter 16, "Human Relations and Equal Opportunity" (hereinafter "the Ordinance"). The original Ordinance was signed into law by Indianapolis Mayor William H. Hudnut, III, on May 1, 1984, and the amendments thereto on June 15, 1984.

2. The plaintiff, American Booksellers Association, Inc., is a trade association composed of booksellers located throughout the United States. The Association has approximately 5,200 members, consisting of private bookstores, department store bookstores, and chain bookstores, some of which are located in Indianapolis.

3. The plaintiff, Association for American Publishers Inc., is a trade association organized under the laws of the State of New York. It is the major national association of publishers of general books, textbooks and educational materials in the United States. Its members publish the vast majority of all general, educational, and religious books and materials produced in the United States, which are sold and distributed in book stores, department stores, drug stores, news-stands and other outlets throughout the United States, some of which are in Indianapolis. The Association has in excess of 300 members, virtually all of which publish materials sold in Indianapolis.

4. The plaintiff, Council for Periodical Distributors Associations, is a national trade association, having over 500 independent, local wholesale distributors of magazines, comic books, paperback books and newspapers, some of which are located or do business in Indianapolis.

5. The plaintiff, Freedom to Read Foundation, a nonprofit organization supported by voluntary donations, was established in 1969 by the American Library Association to

promote and defend First Amendment rights, to foster libraries as institutions wherein First Amendment freedoms are fulfilled, to support the right of libraries to include in their collections and make available any stock which they may legally acquire, and to seek legal precedents for the freedom to read on behalf of all citizens.

6. The plaintiff, International Periodical Distributors Association, Inc., is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

7. The plaintiff, Koch News Company, a partnership operating under the partnership laws of the State of Indiana, is the largest wholesale distributor in Indianapolis of periodicals, hardback books, paperback books, Bibles, school books and children's books.

8. The plaintiff, National Association of College Stores, Inc., is a trade association of college stores located throughout the United States. The Association has approximately 2,500 members, some of which are in Indianapolis.

9. The plaintiff Omega Satellite Products Co., a partnership operating under the partnership laws of the State of Indiana, is a distributor in Indianapolis of television programming received from satellite transmissions.

10. The plaintiff, Video Shack, Inc., is an Indiana corporation which sells and rents motion pictures and other programming on video cassettes at three retail locations in Indianapolis.

11. The plaintiff, Kelly Bentley, is an adult female resident and citizen of Indianapolis, and a reader and viewer of First Amendment protected material.

12. The defendants are the individual City-County officials responsible for enforcement and/or implementation of the Ordinance.

13. Public hearings were held by the Administrative Committee of the Council and by the Council in connection with the passage of the Ordinance at which testimony was given and exhibits were submitted.

14. The Council made the following findings of legislative fact, as set forth in the Ordinance as Section 16-1(a)(2):

> "Sec. 16-1. Findings, policies and purposes.
>
> (a) Findings. the City-County Council hereby makes the following findings:
>
> * * *
>
> (2) Pornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is central in creating and maintaining sex as a basis for discrimination. Poronography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment, education, access to and use of public accommodations, and acquisition of real property; promote rape, battery, child abuse, kidnapping and prostitution and inhibit just enforcement of laws against such acts; and contribute significantly to restricting women in particular from full exercise of citizenship and participation in public life, including in neighborhoods."

15. The stated purpose of the Ordinance is set forth in Section 16-1(b)(8), which provides:

> " (b) It is the purpose of this ordinance to carry out the following policies of the City of Indianapolis and Marion County:
>
> * * *
>
> (8) To prevent and prohibit all discriminatory practices of sexual subordination or inequality through pornography."

16. "Pornography" is defined in the Ordinance as follows:

> "(q) Pornography shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:
>
> (1) women are presented as sexual objects who enjoy pain or humiliation; or
>
> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
>
> (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
>
> (4) Women are presented being penetrated by objects or animals; or
>
> (5) Women are presented in scenarios of degradation, injury, abusement [sic], torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; and [sic]
>
> (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.
>
> The use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section."

Section 16-3(q).

17. Section 16-15 of the Ordinance makes the following discriminatory practices unlawful:

> "(4) Trafficking in pornography: The production, sale, exhibition, or distribution of pornography.
>
> (A) City, state and federally funded public libraries or private and public university and college libraries in wich [sic] pornography is

available for study, including on open shelves, shall not be construed to be trafficking in pornography, but special display presentations of pornography in said places is sex discrimination.

(B) The formation of private clubs or associations for purposes of trafficking in pornography is illegal and shall be considered a conspiracy to violate the civil rights of women.

(C) This paragraph (4) shall not be construed to make isolated passages or isolated parts actionable.

(5) Coercion into a pornographic performance: coercing, intimidating or fraudulently inducing any person, including a man, transsexual, into performing for pornography, which injury may date from any appearance or sale of any product(s) of such performance.

(A) Proof of the following facts or conditions shall not constitute a defense:

I. That the person is a woman; or
II. That the person is or has been a prostitute; or
III. That the person has attained the age of majority; or
IV. That the person is connected by blood or marriage to anyone involved in or related to the making of the pornography; or
V. That the person has previously had, or been thought to have had, sexual relations with anyone, including anyone involved in or related to the making of the pornography; or
VI. That the person has previously posed for sexually explicit pictures for or with anyone, including anyone involved in or related to the making of the pornography at issues; or

VII. That anyone else, including a spouse or other relative, has given permission on the person's behalf; or

VIII. That the person actually consented to a use of the performance that is changed into pornography; or

IX. That the person knew that the purpose of the acts or events in question was to make pornography; or

X. That the person demonstrated no resistance or appeared to cooperate actively in the photographic sessions or in the sexual events that produced the pornography; or

XI. That the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; or

XII. That no physical force, threats, or weapons were used in the making of the pornography; or

XIII. That the person was paid or otherwise compensated."

(6) Forcing pornography on a person: The forcing of pornography on any woman, man, child, or transsexual in any place of employment, in education, in a home, or in any public place.

(7) Assault or physical attack due to pornography: The assault, physical attack, or injury of any woman, man, child, or transsexual in a way that is directly caused by specific pornography."

Section 16-3(g)(4)-(7).

22. Under the Ordinance, Section 16-3(g)(8), it is no defense to the discriminatory practices quoted in Finding 17 above that the respondent did not know or intend that the materials were pornography or sex discrimination, except where money damages are sought against respondent:

"(8)Defenses. Where the materials which are the subject matter of a complaint under paragraphs (4), (5), (6) or (7) of this subsection (g) are pornography, it shall not be a defense that the respondent did not know or intend that the materials were pornography or sex discrimination; provided, however, that in the cases under paragraph (g)(4) of Section 16-3, no damages or compensation for losses shall be recoverable unless the complainant proves that the respondent knew or had reason to know that the materials were pornography. Provided, further, that it shall be a defense to a complaint under paragraph (g)(4) of Section 16-3 that the materials complained of are those covered only by paragraph (q)(6) of Section 16-3."

19. Section 16-17 of the Ordinance sets forth the grounds for filing a complaint, who may file, and the persons against whom a complaint may be filed:

" (a) A complaint charging that any person has engaged in or is engaging in a discriminatory practice prohibited by sections 16-14 and/or 16-15 may be filed with the office by any person claiming to be aggrieved by the practice, or by one or more members of the board or employees of the office who have reasonable cause to believe that a violation of sections 16-14 and 16-15 has occurred, in any of the following circumstances:

* * *

(6) In the cases of trafficing [sic] in pornography, coercion into pornographic performances, and assault or physical attack due to pornography (as provided in Section 16-3(g)(7)) against the perpetrator(s), maker(s), seller(s), exhibitor(s), or distributor(s).

(7) In the case of forcing pornography on a person, against the perpetrator(s) and/or institution.

(b) In the case of trafficking in pornography, any woman may file a complaint as a woman acting against the subordination of women and any man,

child, or transsexual may file a complaint but must prove injury in the same way that a woman is injured in order to obtain relief under this chapter.

(c) In the case of assault or physical attack due to pornography, compensation for losses or an award for damages shall not be assessed against (1) maker(s), for pornography made, (2) distributor(s), for pornography distributed, (3) seller(s), for pornography sold, or (4) exhibitor(s) for pornography exhibited, prior to the effective date of this act."

20. Once a complaint alleging a discriminatory practice has been filed, the Ordinance provides for an investigation of the alleged unlawful practice, and for an informal conference in an effort to eliminate such practice if there is reasonable cause to believe that any violation has occurred:

"Sec. 16-24. Investigation and conciliation.

(1) Investigation. Within ten (10) working days after the receipt of a complaint filed pursuant to this chapter, the chief officer shall initiate an investigation of the alleged discriminatory practice charged in the complaint. All such investigations shall be made by the office at the direction of the chief officer and may include informal conferences or discussions with any party to the complaint for the purpose of obtaining additional information or attempting to resolve or eliminate the alleged discriminatory practice by conciliation or persuasion. The office shall have the authority to initiate discovery, including but not limited to interrogatories, request for production of documents and subpoenas, on approval of the chief officer at any time within ten (10) working days after filing of a complaint. Any request by the office to compel discovery may be by appropriate petition to the Marion County circuit or superior courts.

(2) Report of investigation; determination by panel. Unless the complaint has been satisfactorily resolved prior thereto, the chief officer shall, within thirty (30) working days after the date of filing of a

complaint pursuant to section 16-17, report the results of the investigation made pursuant to subsection (1) to a panel of three (3) members of the board designated by the chairperson or vice-chairperson or pursuant to the rules of the board, which panel shall not include any member of the board who initiated the complaint, who might have participated in the investigation of the complaint, or who is a member of the complaint adjudication committee. The chief officer shall make a recommendation as to whether there is reasonable cause to believe that the respondent has violated sections 16-14 and/or 16-15. The chairperson, vice-chairperson or such other member of the panel so designated, may, for good cause shown, extend the time for making such report. Such extension thereof shall be evidenced in writing, and the office shall serve a copy of the extension on both the complainant and the respondent. The panel shall then determine by majority vote whether reasonable cause exists to believe that any respondent has violated sections 16-14 and/or 16-15. In making such a determination, the panel shall consider only the complaint, the response, if any, and the chief officer's report; provided, however, the panel may request the chief officer to make a supplemental investigation and report with respect to any matter which it deems material to such determination.

(3) Action when violation found. If the panel, pursuant to subsection (2) determines that reasonable cause exists to believe that any respondent has violated sections 16-14 and/or 16-15, it may direct the chief office to endeavor to eliminate the alleged discriminatory practice through a conciliation conference. At least one panel member shall be present at any conciliation conference at which both the complainant and respondent are present or represented. If the complaint is satisfactorily resolved through conciliation, the terms of any agreement reached or undertaking given by any party shall be reduced to writing and signed by the complainant,

respondent and the chief officer. Any disagreement between the respondent and the chief office in regard to the terms or conditions of a proposed conciliation agreement may be referred to the panel which considered the complaint, and the decision of the panel with respect to such terms or conditions shall be final for purposes of conciliation proceedings under this subsection, but shall not be binding upon the respondent without his written consent thereto. No action taken or statement made in connection with any proceedings under this subsection, and no written conciliation agreement or any of the terms thereof, shall be made public by the board or any member thereof, or any agent or employee of the officer, without the written consent of the parties, nor shall any such action, statement or agreement be admissible in evidence in any subsequent proceedings; provided, however, the board or officer may institute legal proceedings under this chapter for enforcement of any written agreement or undertaking executed in accordance with this subsection."

Section 16-24.

21. If the dispute has not been satisfactorily resolved through the informal proceedings outlined in Finding 20, above, the Complaint Adjudication Committee may hold a public hearing, which is governed by the procedure set fortn in Section 16-26, which provides:

"Sec. 16-26. Hearings, findings and recommenddations [sic] when conciliation not effected.

(a) Hearing to be held; notice. If a complaint filed pursuant to this article has not been satisfactorily resolved within a reasonable time through informal proceedings pursuant to section 16-24, or if the panel investigating the complaint determines that a conciliation conference is inappropriate under the circumstances surrounding the complaint, the complaint adjudication committee may hold a public hearing thereon upon not less than ten (10) working days' written notice to the complainant or other aggrieved person, and to the respondent. If the respondent has not previously filed a written response

to the complaint, he may file such response and serve a copy thereof upon the complainant and the office not later than five (5) working days prior to the date of the hearing.

(b) Powers; rights of parties at hearing. In connection with a hearing held pursuant to subsection (1), the complaint adjudication committee shall have power upon any matter pertinent to the complaint or response thereto, to subpoena witnesses and compel their attendance; to require the production of pertinent books, papers or other documents; and to administer oaths. The complainant shall have the right to be represented by the chief officer or any attorney or any other person of his/her choice. The respondent shall have the right to be represented by any attorney or any other person of his/her choice. The complainant and respondent shall have the right to appear in person at the hearing, to be represented by an attorney or any other person, to subpoena and compel the attendance of witnesses, and to examine and cross-examine witnesses. The complaint adjudication committee may adopt appropriate rules for the issuance of subpoenas and the conduct of hearings under this section. The complaint adjudication committee and the board shall have the power to enforce discovery and subpoenas by appropriate petition to the Marion County Circuit or superior courts.

(c) Statement of evidence; exceptions; arguments. Within thirty (30) working days from the close of the hearing, the complaint adjudication committee shall prepare a report containing written recommended findings of fact and conclusions and file such report with the office. A copy of the report shall be furnished to the complainant and respondent, each of whom shall have an opportunity to submit written exceptions within such time as the rules of the complaint adjudication committee shall permit. The complaint adjudication committee may, in its discretion, upon notice to each interested party hear further evidence or argument upon the issues presented by the report and exceptions, if any.

(d) Findings of fact; sustaining or dismissing complaint. If, upon the preponderance of the evidence, the committee shall be of the opinion that any respondent has engaged or is engaging in a discriminatory practice in violation of the chapter, it shall state its findings of fact and conclusions and serve a copy thereof upon the complainant and the respondent. In addition, the committee may cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful discriminatory practice and requiring such person to take further affirmative action as will effectuate the purposes of this chapter, including but not limited to the power to restore complainant's losses incurred as a result of discriminatory treatment, as the committee may deem necessary to assure justice; to require the posting of notice setting forth the public policy of Marion County concerning equal opportunity and respondent's compliance with said policy in places of public accommodations; to require proof of compliance to be filed by respondent at periodic intervals; to require a person who has been found to be in violation of this ordinance, and who is licensed by a city or county agency authorized to grant a license, to show cause to the licensing agency why his license should not be revoked or suspended. If, upon the preponderance of the evidence, the committee shall be of the opinion that any respondent has not engaged in a discriminatory practice in violation of this chapter it shall state its findings of fact and conclusions and serve a copy thereof upon the complainant and the respondent, and dismiss the complaint. Findings and conclusions made by the committee shall be based solely upon the record of the evidence presented at the hearing.

(e) Appeal to the board. Within thirty (30) working days after the issuance of findings and conclusions by the committee, either the complainant or the

respondent may file a written appeal of the decision of the committee to the board; however, in the event that the committee requires a respondent to correct or eliminate a discriminatory practice within a time period less than thirty (30) working days, then that respondent must file his/her appeal within that time period. After considering the record of the evidence presented at the hearing and the findings and conclusions of the committee, the board may affirm the decision of the committee and adopt the findings and conclusions of the committee, or it may affirm the decision of the committee and make supplemental findings and conclusions of its own, or it may reverse the decision of the committee and make findings of fact and conclusions to support its decision. The board may also adopt, modify or reverse any relief ordered by the committee. The board must take any of the above actions within thirty (30) working days after the appeal is filed.

(f) Members of board who are ineligible to participate. No member of the board who initiated a complaint under this chapter or who participated in the investigation thereof shall participate in any hearing or determination under this section as a member of either a hearing panel, the complaint adjudication committee or of the board.

(g) Appliciability [sic] of state law; judicial review. Except as otherwise specifically provided in this section or in rules adopted by the board of the complaint adjudication committee under this chapter, the applicable provisions of the Administrative Adjudication Act, IC 4-22-1, shall govern the conduct of hearings and determinations under this section, and findings of the board hereunder shall be subject to judicial review as provided in that act.

22. Relevant provisions of the Administrative Adjudication Act provide that "any party or person aggrieved by an order or determination made by any such agency shall be entitled to a judicial review thereof...."

I.C. 4-22-1-14(a). Review may be obtained by filing a verified petition in the county in which the aggrieved person resides, or in any county in which the order is to be enforced, within fifteen (15) days after the agency's determination. I.C. 4-22-1-14(a) and (b).

23. If, after a finding that the respondent has engaged in a discriminatory practice, the respondent has failed to correct or eliminate the dicriminatory [sic] practice as prescribed by the board, the board may seek judicial enforcement of its decision by filing a complaint requesting temporary or permanent injunctive relief in its own name in the Marion County circuit or superior courts:

> "Sec. 16-27. Court enforcement.
>
> (a) Institution of action. In any case where the board or the committee has found that a respondent has engaged in or is engaging in a discriminatory practice in violation of sections 16-14 and/or 16-15, and such respondent has failed to correct or eliminate such discriminatory practice within the time limit prescribed by the board or the committee and the time limit for appeal to the board has elapsed, the board may file in its own name in the Marion County circuit or superior courts a complaint against the respondent for the enforcement of section 16-26. Such complaint may request such temporary or permanent injunctive relief as may be appropriate and such additional affirmative relief or orders as will effectuate the purposes of this chapter and as may be equitable, within the powers and jurisdiction of the court."

24. An aggrieved party, after filing a complaint may seek equitable relief through the courts:

> " (c) Temporary judicial relief upon filing of complaint. Upon the filing of a complaint pursuant to section 16-17 by a person claiming to be aggrieved, the chief officer, in the name of the board and in accordance with such procedures as the board shall establish by rule, may seek temporary orders for

injunctions in the Marion County circuit or superior courts to prevent irreparable harm to the complainant, pending resolution of the complaint by the office, complaint adjudication committee and the board."

Section 16-27(c).

25. Section 16-27(e) of the Ordinance provides that in complaints involving discrimination based on pornography, judicial review shall be *de novo*:

" (e) Trial de novo upon finding of sex discrimination related to pornography. In complaints involving discrimination through pornography, judicial review shall be de novo. Notwithstanding any other provision to the contrary, whenever the board or committee has found that a respondent has engaged in or is engaging in one of the discriminatory practices set forth in paragraph (g)(4) of Section 16-3 or as against a seller, exhibitor or distributor under paragraph (g)(7) of Section 16-3, the board shall, within ten (10) days after making such finding, file in its own name in the Marion County circuit or superior court an action for declaratory and/or injunctive relief. The board shall have the burden of proving that the actions of the respondent were in violation of this chapter.

Provided, however, that ... in any complaint under paragraph (g)(4) of Section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of Section 16-3 no temporary or permanent injunction shall issue prior to a final judicial determination that said activities of respondent do constitute a discriminatory practice under this chapter.

Provided further, that no temporary or permanent injunction under paragraph (g)(4) of Section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of Section 16-3 shall extend beyond such material(s) that, having been described with reasonable specificity by the injunction, have been determined to be validly proscribed under the ordinance."

26. Any conclusions of law stated below, to the extent that it constitutes a finding of fact, is herein incorporated by reference as an additional finding of fact by the Court.

Conclusions of Law

1. This Court has jurisdiction of this cause pursuant to 28 U.S.C. §§1331, 1343(3), and 1343(4), 42 U.S.C. §1983, and 28 U.S.C. §§2201 and 2202, and the Court need not abstain from jurisdiction because the subject Ordinance is not susceptible to limiting constructions.

2. Because plaintiffs' contentions are rooted in the First Amendment they have standing to challenge the constitutionality of the Amendment.

3. This case is sufficiently ripe for adjudication at this time, in that there exists a case or controversy within the meaning of Article III of the United States Constitution and the case law interpreting the same.

4. The Ordinance restricts pornography, and pornography as defined in the Ordinance is speech, not conduct.

5. The First Amendment protections extend to regulation of words and pictures to the extent that they express ideas, and, therefore, constitute "speech," as that term is used in the First Amendment to the United States Constitution.

6. Only speech which does not receive First Amendment protection, may be subject to government regulation, and the controls imposed by the Ordinance do not fall within one of those established categories of speech which may be limited by legislative action, such as "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words," *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed.2d 1031 (1942), or child pornography. *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

7. The Ordinance's proscription of "pornography" most closely resembles proscriptions of "obscenity," which are

subject to regulation by government, but it fails to meet the legal definition of obscenity and is, therefore, a restriction on speech that has traditionally been deemed protected by the First Amendment.

8. Since the Ordinance sweeps beyond unprotected obscenity, the expressed purpose of the governmental regulation of pornography is the suppression of protected speech.

9. The proscriptions against pornography as defined in the Ordinance survive constitutional scrutiny only if the State's interest in prohibiting sex discrimination is so compelling as to outweigh the constitutionally protected interest of free speech, and the Court concludes as a matter of law that it does not outweigh the interest of free speech.

10. Assuming *arguendo* that the state's interest in prohibiting sex discrimination does outweigh the First Amendment interest of free speech, the Ordinance is nonetheless unconstitutional for the following reasons:

(a) it is unconstitutionally vague in that it fails to give fair notice to a person of average intelligence regarding what material is intended to be proscribed; and

(b) as applied to the type of activity described in Section 16-3(g)(5) and (6), it constitutes an unconstitutional prior restraint on speech because it fails to provide procedural safeguards to reduce the danger of suppressing speech otherwise protected by the First Amendment.

11. The law is with plaintiffs on all claims asserted in Count I. The Court need not reach the assertions in Counts II, III, IV, and V. However, if defendants had prevailed on Count I, the law is with plaintiffs on all claims asserted in Counts II, III, and V. As to Count IV, the law is with plaintiffs as applied to Section 16-3(g)(5) and (6) and with the defendants as applied to Section 16-3(g)(4) and (7).

12. Plaintiffs are entitled to permanent injunctive and declaratory relief, costs of litigation, and reasonable attorneys' fees.

13. Any finding of fact stated above, to the extent that it constitutes a conclusion of law, is herein incorporated by reference as an additional conclusion of law by the Court.

Dated this 19th day of November, 1984.

/s/ Sarah Evans Barker

Sarah Evans Barker, Judge
United States District Court
Southern District of Indiana

MEMORANDUM

This case comes to the Court amidst heated public and private debate over the problems of pornography and sex discrimination in American society. In apparent response to the perceived urgency and seriousness of these issues, the Indianapolis City-County Council debated and enacted an ordinance with subsequent amendments which sought to deal with both of these conditions by limiting the availability in Indianapolis of materials which depict the sexually explicit subordination of women. The Council defined pornography as the graphic depiction of the sexually explicit subordination of women and then declared pornography a discriminatory practice. By way of outlawing this practice, it then forbade most of the specific acts necessary to produce, sell, or distribute such material.

It is difficult to quarrel either with the Council's underlying concern (that pornography and sex discrimination are harmful, offensive, and inimical to and inconsistent with enlightened approaches to equality) or with its premise that some legislative controls are in order. But beyond that, it is in fact outside the rightful purview of this Court to enter the public debate over whether and to what extent these conditions constitute a real social harm. It is also

beyond the purview of the Court to substitute its judgment for that of the legislative body, either in defining the acceptable community standards in these areas or in imposing appropriate sanctions for behavior which violate those standards.

Thus, the Court's duty in this circumstance is a narrow one. That duty is to assess the constitutionality of the legislative enactment: to determine whether the Ordinance, however well-motivated or otherwise meritorious it may be, unconstitutionally diminishes, violates, or otherwise derrogates [sic] our fundamental freedoms as a people.

This litigation, therefore, requires the Court to weigh and resolve the conflict between the First Amendment guarantees of free speech, on the one hand, and the Fourteenth Amendment right to be free from sex-based discrimination, on the other hand. In addition, the Court must determine whether the Indianapolis enactment meets the due process requirements of the Fifth and Fourteenth Amendments.

The plaintiffs in this lawsuit request the Court "to preliminarily and permanently enjoy enforcement of, and to declare facially unconstitutional, void and of no effect, City-County General Ordinances No. 24 and 35, 1984 (together hereinafter referred to as the "Ordinance"), on the grounds that it is unconstitutional under the United States Constitution. The Ordinance was passed by the City-[County] Council, City of Indianapolis on April 23, 1984, and amended on June 11, 1984, and was signed by the Mayor of Indianapolis on May 1, 1984, and the amendments, on June 15, 1984.

Plaintiffs have cited numerous reasons to support their claim for relief. They first contend that the Ordinance severely restricts the availability, display and distribution of constitutionally protected, non-obscene materials, in violation of the First and Fourteenth Amendments. More

specifically, they claim that the regulatory restraints of the Ordinances are not limited merely to unprotected speech, such as obscenity. As a result, plaintiffs contend that they will be forced under the Ordinance to remove from availability in Indianapolis materials which are in fact protected by the First Amendment.

Plaintiffs' [sic] also contend that in seeking to ban speech directed to the general public because it is highly offensive to many, the Ordinances violate established Supreme Court precedents which preclude the banning of speech simply because its contents may be socially or politically offensive to the majority.

The third contention of plaintiffs is that the Ordinance fails to provide fair notice to the residents of Indianapolis, and to those doing business there, as to what is covered or exempted. Because of this, the Ordinance is said to be unconstitutionally vague, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. It is also alleged that the encroachment of the Ordinance into areas of protected expression has an unconstitutionally "chilling effect" on the exercise by plaintiffs of their rights to free speech under the First Amendment.

Plaintiffs furthermore charge that the Ordinance, providing for "cease and desist" orders to enforce its proscriptions, constitutes a prior restraint which impermissibly allows a governmental Board to act as censor in determining what is and is not protected material under the First Amendment, and to control what materials may be written, distributed, sold, viewed or read in Indianapolis.

Finally, plaintiffs contend that the Ordinance interferes with the free flow of constitutionally protected books, periodicals, motion pictures, and television programs across state lines, in violation of the Commerce Clause of the United States Constitution, Article I, Section 8, and the laws thereunder which Congress has promulgated.

The defendants admit in their answer that the scope of the Ordinance goes beyond regulating obscene materials. However, they assert, such action does not violate the Constitution. Defendants deny every other allegation that the plaintiffs' rights as guaranteed by the United States Constitution are violated by this Ordinance.

I.

JURISDICTION: STANDING AND RIPENESS

Before turning to a discussion of the constitutionality of the Ordinance, it is first necessary to decide whether the plaintiffs have standing to sue, and, if so, whether the case itself is ripe for adjudication.

As mentioned above, the plaintiffs complain that the Ordinance fails to define adequately the type of material intended to be regulated, that it permits unconstitutional prior restraints on speech, and that it is vague and overbroad, all in violation of the First Amendment.

Because the plaintiffs' "claims are rooted in the First Amendment, they are entitled to rely on the impact of the [Ordinance] on the expressive activities of others as well as their own." *Shad v. Bourough of Mount Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). When there are claims based on vagueness and overbreadth, case law "firmly establishes" that plaintiffs do in fact have standing to challenge the legislation. *See Grayned v. City of Rockford*, 408 U.S. 104, 114, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972); *See also, Shad, supra*, 452 U.S. at 66, 101 S.Ct. at 2181; *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). In addition, the complaint makes it clear that plaintiffs' interests are directly affected by the challenged Ordinance, and the Court does here so find. Based on these principles and findings the Court determines that the plaintiffs have standing to challenge the constitutionality of the Ordinance, both in their own individual capacities, and on behalf of others not presently before the Court but who may be similarly situated.

Besides challenging standing, the defendants also contest the propriety of adjudicating these issues at this time, claiming no substantial controversy exists between the parties. Defendants correctly point out that "[t]he basic inquiry is whether the 'conflicting contentions of the parties ... present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'" *Babbit v. United Farm Workers National Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979) (quoting *Railway v. Mail Association* [sic] *v. Corsi*, 326 U.S. 88, 93 (1945)) (other citations omitted). However, to establish a "case or controversy" under Article III of the Constitution, plaintiffs need not necessarily be the subjects of an administrative or judicial proceeding at the time the lawsuit is initiated. *Babbit, supra*, 442 U.S. 297-99, 99 S.Ct. at 2308-09; *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497, 500 (7th Cir. 1980), *cert. denied* 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981). *See also, Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d 201 (1973); *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

Accordingly, the Court finds that this action presents a justiciable case or controversy. Plaintiffs have alleged that the material they sell, distribute, and exhibit falls within the Ordinance, as best they can determine. The fact that the City-County Council amended the initially-passed Ordinance during the pendency of this lawsuit, also "indicates more than a broad policy that it will enforce this law generally." *Maciejewski, supra*, 631 F.2d at 500. Defendants, in fact, have given no indication that they will not enforce the Ordinance if this Court's stay is lifted and the new law is allowed to go into effect. "Under such circumstances, this Court does not feel it 'necessary that [plaintiffs] first expose [themselves] to actual ... prosecution to be entitled to challenge a statute [which they claim] deters the exercise of [their] constitutional rights.'"

NATCO Theatres v. Ratner, 463 F.Supp. 1124, 1127 (S.D.N.Y. 1979), quoting *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1215, 39 L.Ed.2d 505 (1974). *See also Craig v. Boren*, 429 U.S. 190, 194, 97 S.Ct. 451, 455, 50 L.Ed.2d 397 (1976).

II.

FIRST AMENDMENT REQUIREMENTS

This Ordinance cannot be analyzed adequately without first recognizing this: the drafters of the Ordinance have used what appears to be a legal term of art, "pornography," but have in fact given the term a specialized meaning which differs from the meanings ordinarily assigned to that word in both legal and common parlance. In Section 16-3(v) (page 6), the Ordinance states:

> "Pornography shall mean the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that includes one or more of the following: . . ."

There follows at that point a listing of five specific presentations of women in various settings which serve as examples of "pornography" and as such further define and describe that term under the Ordinance.

As is generally recognized, the word "pornography" is usually associated, and sometimes synonomous, with the word, "obscenity." "Obscenity" not only has its own separate and specialized meaning in the law, but in laymen's use also, and it is a much broader meaning than the definition given the word "pornography" in the Ordinance which is at issue in this action. There is thus a considerable risk of confusion in analyzing this ordinance unless care and precision are used in that process.

The Constitutional analysis of this Ordinance requires a determination of several underlying issues: first, the Court must determine whether the Ordinance imposes restraints on speech or behavior (content versus conduct); if the

Ordinance is found to regulate speech, the Court must next determine whether the subject speech is protected or not protected under the First Amendment; if the speech which is regulated by this Ordinance is protected speech under the Constitution, the Court must then decide whether the regulation is constitutionally permissible as being based on a compelling state interest justifying the removal of such speech from First Amendment protections.

A. **Do the Ordinances regulate speech or behavior (content or conduct)?**

It appears to be central to the defense of the Ordinance by defendants that the Court accept their premise that the City-County Council has not attempted to regulate speech, let alone protected speech. Defendants repeat throughout their briefs the incantation that their Ordinance regulates conduct, not speech. They contend (one senses with a certain sleight of hand) that the production, dissemination, and use of sexually explicit words and pictures *is* the actual subordination of women and not an expression of ideas deserving of First Amendment protection. (Defendants' Memorandum In Opposition to Plaintiffs' Motion For Summary Judgment, pp. 17-21).

Defendants claim support for their theory by analogy, arguing that it is an accepted and established legal distinction that has allowed other courts to find that advocacy of a racially "separate but equal" doctrine in a civil rights context is protected speech under the First Amendment though "segregation" is not constitutionally protected behavior. Accordingly, defendants characterize their Ordinance here as a civil rights measure, through which they seek to prevent the distribution, sale, and exhibition of "pornography," as defined in the Ordinance, in order to regulate and control the underlying unacceptable conduct.

The content-versus-conduct approach espoused by defendants is not persuasive, however, and is contrary to

tion, the Supreme Court has recently upheld legislation prohibiting the dissemination of material depicting children engaged in sexual conduct. *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

Having found that the Ordinance at issue here seeks to regulate speech (and not conduct), the next question before the Court is whether the Ordinance, which seeks to restrict the distribution, sale, and exhibition of "pornography" as a form of sex discrimination against women, falls within one of the established categories of speech subject to permissible government regulation, that is, speech deemed to be unprotected by the First Amendment.

It is clear that this case does not present issues relating to profanity, libel, or "fighting words."[1] In searching for an analytical "peg," the plaintiffs argue that the Ordinance most closely resembles obscenity, and is, therefore, subject to the requirements set forth in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). (Plaintiffs' Memorandum Of Law In Support Of Moving Plaintiffs' Motion Pursuant to Federal Rules of Civil Procedure 56 for Summary Judgment, pp. 18-23). But the defendants admit that the scope of the Ordinance is not limited to the regulation of legally obscene material as defined in *Miller*. (*See*, Answer of Defendants William H. Hudnut, III, et al., ¶ 9). In fact, defendants concede that the "pornography" they

[1] Defendants attempt to utilize the language "[words] by their very utterance inflict injury or tend to incite an immediate breach of the peace," *Chaplinsky*, 315 U.S. at 572, 62 S.Ct. at 769, as legal justification for upholding the Ordinance as unprotected speech. Their argument is that pornography "is nothing more than the infliction of injury on women," and is, therefore, unprotected under the First Amendment. (Defendants' Memorandum In Opposition To Plaintiffs' Motion For Summary Judgment, p.22.) In coming to this view, however, defendants have read this passage out of context. The quoted portion of *Chaplinsky* is in reference to the category of speech known as "fighting words," which by their very nature carry the immediate potential for injury. But "pornography" does not fall within the meaning of "fighting words," as that concept has come to be used. The rationale of *Chaplinsky* is, therefore, distinguishable from the instant case and thus not applicable here.

seek to control goes beyond obscenity, as defined by the Supreme Court and excepted from First Amendment protections. Accordingly, the parties agree that the materials encompassed in the restrictions set out in the Ordinance include to some extent what have traditionally been protected materials.

The test under *Miller* for determining whether material is legal obscenity is:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the purient [sic] interest, ...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (citations omitted)

413 U.S. at 24, 93 S.Ct. at 2615.

It is obvious that this three-step test is not directly applicable [to] the present case, because, as has been noted, the Ordinance goes beyond legally obscene material in imposing its controls. The restrictions in the Indianapolis ordinance reach what has otherwise traditionally been regarded as protected speech under the *Miller* test. Beyond that, the Ordinance does not speak in terms of a "community standard" or attempt to restrict the dissemination of material that appeals to the "prurient interest." Nor has the Ordinance been drafted in a way to limit only distributions of "patently offensive" materials. Neither does it provide for the dissemination of works which, though "pornographic," may have "serious literary, artistic, political or scientific value." Finally, the Ordinance does not limit its reach to "hard core sexual conduct," though conceivably "hard core" materials may be included in its proscriptions.

Because the Ordinance spans so much more broadly in its regulatory scope than merely "hard core" obscenity by

limiting the distribution of "pornography," the proscriptions in the Ordinance intrude with defendants' explicit approval into areas of otherwise protected speech. Under ordinary constitutional analysis, that would be sufficient grounds to overturn the Ordinance, but defendants argue that this case is not governed by any direct precedent, that it raises a new issue for the Court and even though the Ordinance regulates protected speech, it does so in a constitutionally permissible fashion.

C. **Does established First Amendment law permit the regulation provided for in the Ordinance of otherwise protected speech?**

In conceding that the scope of this Ordinance extends beyond constitutional limits, it becomes clear that what defendants actually seek by enacting this legislation is a newly-defined class of constitutionally unprotected speech, labeled "pornography" and characterized as sexually discriminatory.

Defendants vigorously argue that *Miller* is not the "'constitutional divide' separating protected from unprotected expression in this area." (Defendants' Memorandum In Opposition To Plaintiffs' Motion For Summary Judgment, pp. 27-31). Defendants point to three cases which allegedly support their proposition that *Miller* is not the exclusive guideline for disposing of pornography/obscenity cases, and that the traditional obscenity test should not be applied in the present case. *See New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982); *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).

Defendants first argue that the Court must use the same reasoning applied by the Supreme Court in *New York v. Ferber, supra*, which upheld a New York statute prohibit-

ing persons from promoting child pornography by distributing material which depicted such activity, and carve out another similar exception to protected speech under the First Amendment.

Defendants can properly claim some support for their position in *Ferber*. There the Supreme Court allowed the states "greater leeway" in their regulation of pornographic depictions of children in light of the State's compelling interest in protecting children who, without such protections, are extraordinarily vulnerable to exploitation and harm. The Court stated in upholding the New York statute:

> "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The legislative findings accompanying passage of the New York laws reflect this concern: ...."

102 S.Ct. at 3355. The Supreme Court continued in *Ferber* by noting that the *Miller* standard for legal obscenity does not satisfy the unique concerns and issues posed by child pornography where children are involved; it is irrelevant, for instance, that the materials sought to be regulated contain serious literary, artistic, political or scientific value. In finding that some speech, such as that represented in depictions of child pornography, is outside First Amendment protections, the *Ferber* court stated:

> "When a definable class of material, such as that covered by §263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment."

Id. at 3358.

Defendants, in the case at bar, argue that the interests of protecting women from sex-based discrimination are

analogous to and every bit as compelling and fundamental as those which the Supreme Court upheld in *Ferber* for the benefit of children. But *Ferber* appears clearly distinguishable from the instant case on both the facts and law.

As has already been shown, the rationale applied by the Supreme Court in *Ferber* appears intended to apply solely to child pornography cases. In *Ferber*, the court recognized "that a state's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' *Globe Newspapers v. Superior Court*, ___ U.S. ___, ___, 102 S.Ct. 2613, 2621, 72 L.Ed.2d (1982)." 102 S.Ct. at 3354. *See also, FCC v. Pacifica Foundation, supra; Prince v. Massachusetts*, 321 U.S. 158, 168, 64 S.Ct. 438, 443, 88 L.Ed. 645 (1944); *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). Also, the obscenity standard in *Miller* is appropriately abandoned in child pornography cases because it "[does] not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitations of children." *Id.* Since a state's compelling interest in preventing child pornography outweighs an individual's First Amendment rights, the Supreme Court held that "the states are entitled to greater leeway in the regulation of pornographic depictions of children." *Id.* at 3354.

On contrast, the case at bar presents issues more far reaching than those in *Ferber*. Here, the City-County Council found that the distribution, sale, and exhibition of words and pictures depicting the subordination of women is a form of sex discrimination and as such is appropriate for governmental regulation. The state has a well-recognized interest in preventing sex discrimination, and, defendants argue, it can regulate speech to accomplish that end.

But the First Amendment gives primacy to free speech and any other state interest (such as the interest of sex based equality under law) must be so compelling as to be

fundamental; only then can it be deemed to outweigh the interest of free speech. This Court finds no legal authority or public policy argument which justifies so broad an incursion into First Amendment freedoms as to allow that which defendants attempt to advance here. *Ferber* does not open the door to allow the regulation contained in the Ordinance for the reason that adult women as a group do not, as a matter of public policy or applicable law, stand in need of the same type of protection which has long been afforded children. This is true even of women who are subject to the sort of inhuman treatment defendants have described and documented to the Court in support of this Ordinance. The Supreme Court's finding in *Ferber* of the uncontroverted state interest in "safeguarding the physical and psychological well being of a minor" and its resultant characterization of that interest as "compelling," 102 S.Ct. 3348, 3354, is an interest which inheres to children and is not an interest which is readily transferrable to adult women as a class. Adult women generally have the capacity to protect themselves from participating in and being personally victimized by pornography, which makes the State's interest in safeguarding the physical and psychological well-being of women by prohibiting "the sexually explicit subordination of women, graphically depicted, whether in pictures or in words" not so compelling as to sacrifice the guarantees of the First Amendment. In any case, whether a state interest is so compelling as to be a fundamental interest sufficient to warrant an exception from constitutional protections, therefore, surely must turn on something other than mere legislative dictate, which issue is discussed more fully further on in this Opinion. *See* Section "C," *Infra.*

The second case relied upon by defendants to support their contention that *Miller* is not controlling in the present case is *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). According to defendants, *Pacifica* exemplifies the Supreme Court's refusal to make

obscenity the sole legal basis for regulating sexually explicit conduct.

In *Pacifica*, the Supreme Court was faced with the question of whether a broadcast of patently offensive words dealing with sex and excretion may be regulated on the basis of their content. 438 U.S. at 745, 98 S.Ct. at 3038. The Court held that this type of speech was not entitled to absolute constitutional protection in every context. *Id.* at 747, 98 S.Ct. at 3039. Since the context of the speech in *Pacifica* was broadcasting, it was determined only to be due "the most limited First Amendment protection." *Id.* at 748, 98 S.Ct. 3040. The reason for such treatment was twofold:

> "First, the broadcast media have established a uniquely pervasive presence in all the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."
>
> * * *
>
> Second, broadcasting is uniquely accessible to children, even those too young to read..."

Id. at 748-49, 98 S.Ct. at 3040.

Although the defendants correctly point out that the Supreme Court did not use the traditional obscenity test in *Pacifica*, this Court is not persuaded that the rule enunciated there is applicable to the facts of the present case. The Ordinance does not attempt to regulate the airwaves; in terms of its restrictions, it is not even remotely concerned with the broadcast media. The reasons for the rule in *Pacifica*, that speech in certain contexts should be afforded minimal First Amendment protection, are not present here, since we are not dealing with a medium that "invades" the privacy of the home. In contrast, if an individual is offended by "pornography," as defined in the

Ordinance, the logical thing to do is avoid it, an option frequently not available to the public with material disseminated through broadcasting.

In addition, the Ordinance is not written to protect children from the distribution of pornography, in contrast to the challenged FCC regulation in *Pacifica*. Therefore, the peculiar state interest in protecting the "well being of its youth," *id.* at 649, 98 S.Ct. at 3040 (quoting *Ginsberg v. New York*, 390 U.S. 629, 33 S.Ct. 1274, 20 L.Ed.2d 195 (1968)), does not underlie this Ordinance and cannot be called upon to justify a decision by this Court to uphold the Ordinance.

The third case cited by defendants in support of their proposition that the traditional obscenity standard in *Miller* should not be used to overrule the Ordinance is *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). In *Young* the Supreme Court upheld a city ordinance that restricted the location of movie theatres featuring erotic films. The Court, in a plurality opinion, stated that "[e]ven though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." 427 U.S. at 71-72, 96 S.Ct. at 2452. The Court concluded that the city's interest in preserving the character of its neighborhoods justified the ordinance which required that adult theaters be separated, rather than concentrated, in the same areas as it is permissible for other theaters to do without limitation. *Id.* at 71, 96 S.Ct. at 2452-53.

Young is distinguishable from the present case because we are not here dealing with an attempt by the City-County Council to restrict the time, place, and manner in which "pornography" may be distributed. Instead, the Ordinance prohibits completely the sale, distribution, or exhibition of material depicting women in a sexually subordinate role, at all times, in all places and in every manner.

The Ordinance's attempt to regulate speech beyond one of the well-defined exceptions to protected speech under the first Amendment is not supported by other Supreme Court precedents. The Court must, therefore, examine the underlying premise of the Ordinance: that the State has so compelling an interest in regulating the sort of sex discrimination imposed and perpetuated through "pronography" that it warrants an exception to free speech.

C. Is sex discrimination a compelling state interest justifying an exception to First Amendment Protections?

It is significant to note that the premise of the Ordinance is the sociological harm, *i.e.*, the discrimination, which results from "pornography" to degrade women as a class. The Ordinance does not presume or require specifically defined, identifiable victims for most of its proscriptions. The Ordinance seeks to protect adult women, as a group, from the diminution of their legal and sociological status as women, that is, from the discriminatory stigma which befalls women *as women* as a result of "pornography." On page one of the introduction to defendants' *Amicus* Brief, counsel explicitly argues that the harm which underlies this legislation is the "harm to the treatment and *status* of women ... on the basis of sex." *See* Brief of Linda Marchiano *Amicus Curiae*, page 1 (emphasis supplied).

This is a novel theory advanced by the defendants, an issue of first impression in the courts. If this Court were to accept defendants' argument — that the State's interest in protecting women from the humiliation and degradation which comes from being depicted in a sexually subordinate context is so compelling as to warrant the regulation of otherwise free speech to accomplish that end — one wonders what would prevent the City-County Council (or any other legislative body) from enacting protections for other equally compelling claims against exploitation and discrimination as are presented here. Legislative bodies,

finding support here, could also enact legislation prohibiting other unfair expression — the publication and distribution of racist material, for instance, on the grounds that it causes racial discrimination,[2] or legislation prohibiting ethnic or religious slurs on the grounds that they cause discrimination against particular ethnic or religious groups, or legislation barring literary depictions which are uncomplimentary or oppressive to handicapped persons on the grounds that they cause discrimination against that group of people, and so on. If this Court were to extend to this case the rationale in *Ferber* to uphold the Amendment, it would signal so great a potential encroachment upon First Amendment freedoms that the precious liberties reposed within those guarantees would not survive. The compelling state interest, which defendants claim gives constitutional life to their Ordinance, though important and valid as that interest may be in other contexts, is not so fundamental an interest as to warrant a broad intrusion into otherwise free expression.

Defendants contend that pornography is not deserving of constitutional protection because its harms victimize all women. It is argued that "pornography" not only negatively effects [sic] women who risk and suffer the direct abuse of

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[2] In *Beauharnais v. Illinois*, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952), the Supreme Court upheld an Illinois libel statute prohibiting the dissemination of materials promoting racial or religious hatred and which tended to produce a breach of the peace and riots. It has been recognized that "the rationale of that decision turns quite plainly on the strong tendency of the prohibited utterances to cause violence and disorder." *Collins v. Smith*, 578 F.2d 1197, 1204 (7th Cir. 1978). The Supreme Court has recognized breach of the peace as the traditional justification for upholding a criminal libel statute. *Beauharnais*, 343 U.S. at 254, 72 S.Ct. at 729. Therefore, a law preventing the distribution of material that causes racial discrimination, an attitude, would be upheld under this analysis. Further, the underlying reasoning of the *Beauharnais* opinion, that the punishment of libel raises no constitutional problems, has been questioned in many recent cases. *See Collins, supra*, 578 F.2d at 1205, and cases cited therein.

its production,[3] but also, those on whom violent pornography is forced through such acts as compelled performances of "dangerous acts such as being hoisted upside down by ropes, bound by ropes and chains, hung from trees and scaffolds or having sex with animals. . . ." Defendants' Memorandum In Support To Plaintiffs' Motion For Summary Judgment, pp.3-4.[4] It is also alleged that exposure to pornography produces a negative impact on its viewers, causing in them an increased willingness to aggress toward women, *ibid.* at p.4, and experience self-generated rape fantasies, increases in sexual arousal and a rise in the self-reported possibility of raping. *Ibid.* at p.6. In addition, it causes discriminatory attitudes and behavior toward all women. *Ibid*, at pp.11-12. The City-County Council, after considering testimony and social research studies, enacted the Ordinance in order to "combat" pornography's "concrete and tangible harms to women." *Ibid.* at p.13.

Defendants rely on *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 98 S.Ct. 2628, 37 L.Ed.2d 446 (1965), to justify their regulation of "pornography." In that case the Supreme Court held "that there are legitimate state interests at stake in stemming the tide of commercialized obscenity ... [which] include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." 413 U.S. at 57-58, 93 S.Ct. 2635.

The Georgia Legislature had determined that in that case exposure to obscene material adversely affected men

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[3] The defendants point to social research data, as well as graphic personal accounts of individuals, in support of their position that "women are recruited into all forms of sexual exploitation through physical force, psychological coercion, drugs and economic exigencies." Defendants' Memorandum In Support To Plaintiffs' Motion For Summary Judgment, p.2.

[4] Examples of these types of "harms" were submitted to the City-Council at the public hearings held in regard to the Amendment. *See* Exhibits A-U.

and women, that is to say, society as a whole. Although the petitioners argued in that case that there was no scientific data to conclusively prove that proposition, the Court said, "[i]t is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the constitution itself." *Id.* at 60, 93 S.Ct. at 2636-37 (footnote omitted).

In *Slaton*, the Georgia Legislature sought to regulate "obscenity," an accepted area of unprotected speech. *See Miller v. Cohen* [sic], 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The Court specifically found that "nothing precludes the State of Georgia from the regulation of the allegedly obscene material exhibited in Paris Adult Theatre I or II, provided that the applicable Georgia law, as written or authoritatively interpreted by the Georgia courts, meets the First Amendment standards set forth in *Miller v. California*..." 413 U.S. at 69, 93 S.Ct. at 2642 (citations omitted).

Based on this reasoning, defendants argue that there is more than enough "empirical" evidence in the case at bar to support the City-County Council's conclusion that "pornography" harms women in the same way obscenity harms people, and, therefore, this Court should not question the legislative finding. As has already been acknowledged, it is not the Court's function to question the City-County Council's legislative finding. The Court's solitary duty is to ensure that the Ordinance accomplishes its purpose without violating constitutional standards or impinging upon constitutionally protected rights. In applying those tests, the Court finds that the Ordinance cannot withstand constitutional scrutiny.

It has already been noted that the Ordinance does not purport to regulate legal obscenity, as defined in *Miller*. Thus, although the City-County Council determined that "pornography" harms women, this Court must and does

declare the Ordinance invalid without being bound by the legislative findings because "pornography," as defined and regulated in the Ordinance, is constitutionally protected speech under the First Amendment and such an exception to the First Amendment protections is constitutionally unwarranted.[5] This Court cannot legitimately embark on judicial policy-making, carving out a new exception to the First Amendment simply to uphold the Ordinance, even when there may be many good reasons to support legislative action. To permit every interest group, especially those who claim to be victimized by unfair expression, their own legislative exceptions to the First Amendment so long as they succeed in obtaining a majority of legislative votes in their favor demonstrates the potentially predatory nature of what defendants seek through this Ordinance and defend in this lawsuit.

It ought to be remembered by defendants and all others who would support such a legislative initiative that, in terms of altering sociological patterns, much as alternation may be necessary and desirable, free speech, rather than being the enemy, is a long-tested and worthy ally. To deny free speech in order to engineer social change in the name of accomplishing a greater good for one sector of our society erodes the freedoms of all and, as such, threatens tyranny and injustice for those subjected to the rule of such laws. The First Amendment protections presuppose the evil of such tyranny and prevent a finding by this Court upholding the Ordinance.

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[5] Defendants again rely on *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), contending that since the legislation in that case was upheld upon a single affidavit of a sociologist that the location of adult movie theatres had a disruptive impact on the community, the Ordinance should be upheld because there is more than enough data to demonstrate that pornography harms women. As discussed above in subpart B, however, the legislation in *Young* sought to regulate the place where pornography could be distributed, not to completely ban its distribution. Thus *Young* is not controlling.

III.

FIFTH AMENDMENT DUE PROCESS REQUIREMETS

Assuming *arguendo* that the Court had found that the State has a compelling interest in preventing sex discrimination which interest outweighs First Amendment rights, there remain other constitutional requirements which the Ordinance must satisfy in order to be upheld. The Court must determine if the Ordinance is unconstitutionally vague, if it is facially overbroad, if it constitutes a prior restraint on free speech, or if it violates procedural due process safeguards. The Court, therefore, shall here address each of these issues as if it had found the Ordinance to be properly-regulated speech.

A. Vagueness

Plaintiffs contend the Ordinance is unconstitutionally vague, in that it fails to give fair notice of the material intended to be regulated. Plaintiffs challenge a long list of words and phrases on the grounds they are unconstitutionally vague:

"pornography"
"graphic sexually explicit subordination"
"subordination of women"
"sexual objects for domination, conquest, violation, exploitation, possession or use"
"postures or positions of servility, submission, or display"
"special display presentations of pornography"
"a woman acting against the subordination of women"
"in the way women are injured by it"
"forcing pornography on a person"
"directly caused by specific pornography"
"the use of men, children or transsexuals in the place of women,"
"unlawful"
"isolated passages or isolated parts"

Plaintiffs also contest on the grounds of vagueness Section 16-28 relating to exhaustion of remedies.

In *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), the Supreme Court stated that a law is void for vagueness if its prohibitions are not clearly defined.

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked.'"

408 U.S. at 108-09, 92 S.Ct. at 2298-99 (footnotes omitted).

The Supreme Court in *Keyishian v. Board of Regents*, 385 U.S. 589, 603-4 (1967) has cautioned that:

> "precision of regulation must be the touchstone in an area so colsely touching our most precious freedoms. ... Because First Amendment freedoms need breathing space to survive, government may regulate in this area only with narrow specificity ... when one must guess what conduct or utterance may (lead to governmental action taken against him), one necessarily will 'steer far wider of the unlawful zone.'"

In examining the subject enactments, the Court is struck by the vagueness problems inherent in the definition of pornography, itself, more specifically, the term, "subordination of women." That term is not specifically defined in the Ordinance, and it is almost impossible to settle in ones [sic] own mind or experience upon a single meaning or understanding of that term. At the very least, it is difficult to settle upon a meaning which will give persons "of ordinary intelligence a reasonable opportunity to know what is prohibited, so that (they) may act accordingly." *Grayned, supra*, 408 U.S. at 108. Nothing in the Ordinance, for instance, suggests whether the forbidden "subordination of women" relates to a physical, social, psychological, religious, or emotional subordination or some other form or combination of these. What constitutes subordination under this Ordinance is left finally to the censorship committee or to individual plaintiffs who choose to bring actions to enforce provisions (of the Ordinance), and under any due process standards, that is unfair in a fundamental and constitutional sense.

The enumerated categories of pornography set out in the Ordinance are also plagued with these same constitutional deficiencies relating to vagueness. For instance, the Ordinance makes it unlawful to depict women, whether in "words or pictures," in "scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual." (Section 16-3(q)(5)). The meanings of the terms, "degradation," "abasement," and "inferior," are subjective terms, reflective of the observer's state of mind. Because these terms arguably have several different meanings, a person of "ordinary intelligence" would not be on notice as to what acts are proscribed by the Ordinance. This vagueness problem is compounded when these terms are joined, definitionally, with the phrase, "in a context that makes these conditions sexual," which is, in itself, also subject to several meanings and which phrase is not further

defined in the Ordinance. How then are buyers or sellers of literature, *e.g.*, *The Witches of Eastwick*, by John Upkide [sic], to know if their interpretation of the prohibitions in the Ordinance comports with that of the censorship committee or the individuals who seek to privately enforce the Ordinance? The Ordinance clearly threatens to "trap the innocent by not providing fair warning," which makes its provisions impermissibly vague in violation of the Due Process Clause of the Fifth Amendment. *See Grayned*, *supra*, 408 U.S. at 108-09, 92 S.Ct. at 2298-99.

This is the vagueness which the Fifth Amendment/Due Process rules protect against. Many, if not all of the other words and phrases challenged by plaintiff in this lawsuit on the grounds of vagueness are as difficult, indeed, mystifying as to their precisely-intended meanings, as is "the subordination of women." It is beyond the proper exercise of judicial authority to attempt to re-write the Ordinance to overcome such problems as vagueness, *see Miller v. California*, 413 U.S. at 26, 93 S.Ct. at 2615, and the Court thereby refrains from offering definitions or new language to satisfy constitutional standards. But the Court finds the Ordinance unconstitutionally vague in its use of particular phrases as well as its more generalized prohibitions. Persons subjected to this Ordinance cannot reasonably steer between lawful and unlawful conduct, with confidence that they know what its terms prohibit.

B. Overbreadth

Plaintiffs also contend that the Ordinance is unconstitutionally overbroad because it restricts the sale, distribution, and exhibition of material protected by the First Amendment. Specifically, plaintiffs allege that the Ordinance regulates non-obscene material and is not limited to the proscription of "hard core" pornography. *See Miller v. California*, *supra*. Plaintiffs claim that "pornography," as defined in the Ordinance, "contains no 'community standard' test, does not require that the

material be 'patently offensive' or 'taken as a whole,' and fails to exempt works that have serious 'literary, artistic, political or scientific value.'" *See* Memorandum Of Law In Support Of Moving Plaintiffs' Motion Pursuant to Fed.R.Civ.P. 56 For Summary Judgment, p.19.[6]

Because the Court has already determined that the Ordinance on its face violates the First Amendment, it need not belabor its discussion as to overbreadth. The Court specifically found that the Ordinance proscribes protected First Amendment speech. In order to discuss the overbreadth in this context, the Court would have to assume as argument that the Ordinance actually proscribes unprotected speech. Obviously, if it proscribes unprotected speech, it raises no constitutional issues, in particular, issues relating to overbreadth. There being no purpose served by such a discussion and the other related constitutional issues having been otherwise resolved, the Court makes no finding as to overbeadth.

C. Prior Restraint

Plaintiffs contend that the Ordinance is an unconstitutional prior restraint on free speech, in that it allows the City-County government acting through an operating board to prevent the circulation of a book, magazine or movie because some of the citizens disagree with its contents.

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[6] Examples of non-obscene films that plaintiffs claim will fall within the meaning of "pornography" are: "Dressed to Kill," "Ten," "Star 80," "Body Heat," "Swept Away," and "Last Tango In Paris." Plaintiffs also contend that the following books would come within the Amendment: *The Witches of Eastwick*, by John Updike, *The Delta of Venus*, Anais Nin, *The Other Side of Midnight*, by Sidney Shelton, *Scruples*, by Judith Krantz, various James Bond novels by Ian Flemming, *The Carpetbaggers*, by Harold Robbins. Amici American Civil Liberties Union and the Indiana Civil Liberties Union have attached a "sampling" of art, literature, and scholarly material they say will be proscribed under the Amendment. *See* Brief of the Amer.Civ.Lib.Union and the Ind.Civ.Lib.Union Amici Curiae, overbreadth appendix.

The Court finds that one portion of the Ordinance contains a censorship system which does comport with constitutional requirements and that it is, therefore, a lawful prior restraint, but that a second part does not satisfy constitutional requirements and is thus violative of the Constitution. Different administrative procedures apply to the four different types of discriminatory practices enunciated in Section 16-3(g)(4)-(7) of the Ordinance. The procedure specifically applicable to trafficking in pornography, Section 16-3(g)(4), and assault or physical attack due to pornography, Section 16-3(g)(7), satisfies the applicable constitutional requirements and is, therefore, lawful, while the provisions relating to coercion into pornography, Section 16-3(g)(5), and forcing pornography on a person, Section 16-3(g)(6), do not meet the requisite constitutional standards.

A prior restraint is not unlawful *per se*. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, n.10, 83 S.Ct. 631, 639 n.10 (1963). However, any system of prior restraints bears a heavy presumption against its constitutional validity. *Id.* To be upheld as a lawful prior restraint, defendants must make two showings: (1) that the Ordinance falls within one of the narrowly defined exceptions to the prohibition against prior restraint and (2) that the Ordinance complies with the procedural safeguards that reduce the danger of suppressing speech protected under the First Amendment. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 95 S.Ct. 1239, 1247; *Bantam Books, supra*, 372 U.S. at 71, 83 S.Ct. at 639.

Obscenity has traditionally been one of the narrowly-defined exceptions to the rule against prior restraints emanating from the First Amendment, *see Freedman v. State of Maryland*, 380 U.S. 51, 85 S.Ct. 734 (1965), and, since the *Ferber* opinion in 1982, child pornography has also been excepted. Even if we assume that the Ordinance imposes a "permissible" prior restraint as discussed above, it must independently afford procedural due process protections. *Conrad, supra.*

In *Freedman v. Maryland, supra*, the Supreme Court set forth the procedural requirements necessary to insure against the suppression of protected speech. The Court stated that a system of prior restraint

> "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden the proving that the film is unprotected expression must rest on the censor. . . . Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. . . . [Third,] the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license."

380 U.S. at 58-59, 85 S.Ct. at 739. *See Conrad*, 420 U.S. at 560, 95 S.Ct. at 1247.

As mentioned above, the Ordinance provisions relating to coercion and forcing pornography as contained in Section 16-26(d) do not meet the procedural requirements of *Freedman*; thus, such provisions constitute an unlawful prior restraint. The provisions in question allow the governmental committee to make findings and conclusions based upon the evidence presented, and to either sustain or dismiss the complaint. The provisions also give the Board the authority to issue an order requiring respondent to cease and desist from doing the unlawful discriminatory practice as defined in the Ordinance, as well as the authority to restore to the complainant any losses incurred as a result of the discriminatory practice. Finally, the provisions broadly permit the Board to take any other affirmative action necessary to effectuate the purposes of the Ordinance.

The Committee's findings and conclusions may be appealed; however, the burden of taking the appeal is upon the party against whom the decision has been made. Section 16-26(e). After the decision of the Board is made, whether it is an affirmation or reversal of the Committee's decision, it may be appealed to the state courts by an aggrieved party in accordance with the provisions of the Administrative Adjudication Act. Section 16-26(g). The Act further provides that the burden is upon the aggrieved party to file a verified petition within fifteen (15) days after the Board's determination. I.C. 4-22-1-14(a) and (b).

This procedural scheme is unconstitutional for several reasons. First, if the Board decides in favor of the complainant, it is the responsibility of the respondent, as an aggrieved party, to initiate judicial proceedings to prove that the material is protected. Second, the prior restraint, once imposed, lasts until the pendency of judicial review by the court. Also, the Board, in its discretion, may award to the complainant an amount to compensate for any losses, or any other relief it deems necessary. This process goes far beyond the mere preservation of the status quo. Third, there are no provisions allowing for a "prompt" judicial determination of the Board's decision. *See* I.C. 4-22-1-18 (1984). This type of procedure is expressly prohibited by *Freedman*, and it constitutes an unlawful prior restraint.

Although the provisions just out-lined fail to satisfy the procedural requirements, there are other provisions in the Ordinance which relate specifically to trafficking in pornography and assault or physical attack due to pornography which do meet the *Freedman* test. The first requirement is met in Section 16-27(e), which provides that the burden of instituting judicial proceedings is upon the censor:

> "whenever the board or committee has found that a respondent has engaged in or is engaging in one of the discriminatory practices set forth in paragraph (g)(4) of Section 16-3, or as against a seller, exhibitor or distributor under paragraph (g)(7) of Section 16-3, the

> board shall, within ten (10) days after making such finding, file in its own name in the Marion County circuit or superior court an action for declaratory and/or injunctive relief. The board shall have the burden of proving that the actions of the respondent were in violation of this chapter."

Section 16-27(e). The second and third requirements of *Freedman*, that any restraint prior to judicial review be imposed only for a brief period of time to preserve the status quo and that final judicial review be prompt, have also been satisfied:

> "that in any complaint under paragraph (g)(4) of Section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of Section 16-3 no temporary or permanent injunction shall issue prior to a final judicial determination that said activities of respondent do constitute a discriminatory practice under this chapter."

Section 16-27(e). This system of prior restraints is constitutional insofar as the procedural mandates of *Freedman* are concerned. However, even though certain portions of the administrative process outlined by the Ordinance pass constitutional muster, because the *Freeman* [sic] procedural due process standard is not satisfied *in toto*, the entire Ordinance fails for imposing an unconstitutional prior restraint on First Amendment expression.

SUMMARY

For the foregoing reasons, the Court finds that the Ordinance regulates speech protected by the First Amendment and is, therefore, in violation of the United States Constitution. The Ordinance's proscriptions are not limited to categories of speech, such as obscenity or child pornography, which have been excepted from First Amendment protections and permitted some governmental regulation. The City-County Council, in defining and outlawing "pornography" as the graphically depicted

subordination of women, which it then characterizes as sex discrimination, has sought to regulate expression, that is, to suppress speech. And although the State has a recognized interest in prohibiting sex discrimination, that interest does not outweigh the constitutionally protected interest of free speech. For these reasons the Ordinance does not withstand this constitutional challenge.

Dated this 19th day of November, 1984.

/s/ Sarah Evans Barker

Sarah Evans Barker, Judge
United States District Court
Southern District of Indiana

APPENDIX C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 20, 1985.

Before

HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. FRANK H. EASTERBROOK, *Circuit Judge*
HON. LUTHER M. SWYGERT, *Senior Circuit Judge*

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al., *Plaintiffs-Appellees,*	) Appeal from the) United States) District Court for) the Southern
No. 84-3147 vs.	) District of Indiana,) Indianapolis
WILLIAM H. HUDNUT, III, Mayor of the City of Indianapolis, et al., Defendants-Appellants.	) Division.) No. 84 C 791) Sarah Evans Barker, *Judge*

ORDER

Defendants-appellants filed a petition for rehearing and suggestion of rehearing en banc on September 10, 1985. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

U.S.C.A. — 7th Circuit
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APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al.,	)	
Plaintiffs-Appellees,	)	
vs.	)	NO. 84-3147
WILLIAM H. HUDNUT, III, Mayor of the City of Indianapolis, et al.,	)	
Defendants-Appellants.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that William H. Hudnut, III, Mayor of the City of Indianapolis, et al., the Defendants-Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Seventh Circuit entered in this action on August 27, 1985 in which Section 16-3(q) of Chapter 16 of the Code of Indianapolis and Marion County, Indiana was struck down as violative of the First Amendment to the Constitution of the United States.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

Respectfully submitted,

CITY-COUNTY LEGAL DIVISION
JOHN P. RYAN
CORPORATION COUNSEL

By: /s/ Mark Dall
Mark Dall
Assistant Corporation Counsel

By: /s/ Kathryn A. Watson
Kathryn A. Watson
Assistant Corporation Counsel

APPENDIX E

CODE OF INDIANAPOLIS AND MARION COUNTY, INDIANA

Chapter 16

HUMAN RELATIONS; EQUAL OPPORTUNITY*

Sec. 16-1. Findings, policies and purposes.

(a) *Findings.* The city-county council hereby makes the following findings:

(1) The council finds that the practice of denying equal opportunities in employment, education, access to and use of public accommodations, and acquisition of real estate based on race, color, religion, ancestry, national origin, handicap, or sex is contrary to the principles of freedom and equality of opportunity and is a burden to the objectives of the policies contained herein and shall be considered discriminatory practices.

(2) Pornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is central in creating and maintaining sex as a basis for discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment, education, access to and use of public accommodations, and acquisition of real property; promote rape, battery, child abuse, kidnapping and prostitution and inhibit just enforcement of laws against such acts; and contribute

* To facilitate quick reference to the pertinent provisions of the ordinance, petitioner has underscored all language relating specifically to pornography.

significantly to restricting women in particular from full exercise of citizenship and participation in public life, including in neighborhoods.

(b) It is the purpose of this chapter to carry out the following policies of the City of Indianapolis and Marion County:

(1) To provide equal employment opportunity in all city and county jobs without regard to race, color, religion, handicap, national origin, ancestry, age, sex, disabled veteran, or Vietnam era veteran status;

(2) To encourage the hiring of the handicapped in both the public and the private sectors and to provide equal access to the handicapped to public accommodations;

(3) To utilize minority-owned businesses, securing goods and services for the city and county in a dollar amount equal to at least ten (10) per cent of monies spent by the City of Indianapolis and Marion County;

(4) To utilize women-owned businesses and encourage the utilization of women in construction and industry;

(5) To protect employers, labor organizations, employment agencies, property owners, real estate brokers, builders, lending institutions, governmental and educational agencies and other persons from unfounded charges of discrimination;

(6) To provide all citizens of the City of Indianapolis and Marion County equal opportunity for education, employment, access to public accommodations without regard to race, religion, color, handicap, sex, national origin, ancestry, age, or disabled veteran or Vietnam era veteran status;

(7) To provide all citizens of the City of Indianapolis and Marion County equal opportunity for

acquisition through purchase or rental of real property including, but not limited to, housing without regard to race, sex, religion or national origin; and

(8) To prevent and prohibit all discriminatory practices of sexual subordination or inequality through pornography.

Sec. 16-2. Nondiscrimination clauses.

(1) Every contract to which one of the parties is the city or the county, or any board, department or office of either the city or county, including franchises granted to public utilities, shall contain a provision requiring the governmental contractor and subcontractors not to discriminate against any employee or applicant for employment in the performance of the contract, with respect to hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment, because of race, sex, religion, color, national origin, ancestry, age, handicap, disabled veteran status and Vietnam era veteran status. Breach of this provision may be regarded as a material breach of the contract.

(2) All applications, postings, announcements, and advertisements recruiting applicants for employment with the city or county shall conspicuously post in the bottom margin of such recruiting bids a clause as follows: "An Affirmative Action Equal Employment Opportunity Employer."

Sec. 16-3. Definitions.

As used in this chapter, the following terms shall have the meanings ascribed to them in this section:

(a) *Acquisition of real estate* shall mean the sale, rental, lease, sublease, construction or financing, including negotiations and any other activities or procedures incident thereto, of:

(1) Any building, structure, apartment, single room or suite of rooms or other portion of a building, occupied as or designed or intended for occupancy as living quarters by one or more families or single individuals;

(2) Any building, structure or portion thereof, or any improved or unimproved land utilized or designed or intended for utilization, for business, commercial, industrial or agricultural purposes;

(3) Any vacant or unimproved land offered for sale or lease for any purpose whatsoever.

(b) *Appointing authorities* shall mean and include the mayor, city-county council and such other person or agency as may be entitled to appoint any member of the equal opportunity advisory board created in this chapter.

(c) *Appraiser* shall mean any person who, for a fee or in relation to his/her employment or usual occupation, establishes a value for any kind of real estate, the acquisition of which is defined in this section.

(d) *Board* shall mean the equal opportunity advisory board.

(e) *Complainant* shall mean any person who signs a complaint on his/her own behalf alleging that he/she has been aggrieved by a discriminatory practice.

(f) *Complaint* shall mean a written grievence filed with the office of equal opportunity, either by a complainant or by the board or office, which meets all the requirements of sections 16-18 and 16-19.

(g) *Discriminatory practice* shall mean and include the following:

(1) The exclusion from or failure or refusal to extend to any person equal opportunities or any difference in the treatment of any person by

reason of race, sex, religion, color, national origin or ancestry, handicap, age, disabled veteran or Vietnam era veteran status.

(2) The exclusion from or failure or refusal to extend to any person equal opportunities or any difference in the treatment of any person, because the person filed a complaint alleging a violation of this chapter, testified in a hearing before any members of the board or otherwise cooperated with the office or board in the performance of its duties and functions under this chapter, or requested assistance from the board in connection with any alleged discriminatory practice, whether or not such discriminatory practice was in violation of this chapter.

(3) In the case of a real estate broker or real estate salesperson or agent, acting in such a capacity in the ordinary course of his/her business or occupation, who does any of the following:

a. Any attempt to prevent, dissuade or discourage any prospective purchaser, lessee or tenant of real estate from viewing, buying, leasing or renting the real estate because of the race, sex, religion or national origin of:

1. Students, pupils or faculty of any school or school district;

2. Owners or occupants, or prospective owners or occupants, of real estate in any neighborhood or on any street or block; provided, however, this clause shall not be construed to prohibit disclosure in response to inquiry by any prospective purchaser, lessee or tenant of:

(i) Information reasonably believed to be accurate regarding such race, sex, religion or national origin; or

(ii) The honest professional opinion or belief of the broker, salesperson or agent regarding factors which may affect the value or desirability of property available for purchase or lease.

b. Any solicitation, promotion or attempt to influence or induce any owner to sell, lease or list for sale or lease any real estate, which solicitation, promotion or attempted inducement includes representations concerning:

1. Race, sex, religion or national origin or present, prospective or possible purchasers or occupants of real estate in any area, neighborhood or particular street or block;

2. Present, prospective or possible neighborhood unrest, tension or change in the race, sex, religion or national origin of occupants or prospective occupants of real estate in any neighborhood or any street or block;

3. Present, prospective or possible decline in market value of any real estate by reason of the present, prospective or possible entry into any neighborhood, street or block of persons of a particular race, sex, religion or national origin;

4. Present, prospective or possible decline in the quality of education offered in any school or school district by reason of any change in the race, sex, religion or national origin of the students, pupils or faculty of such school or district.

(4) Trafficking in pornography: The production, sale, exhibition, or distribution of pornography.

a. City, state, and federally funded public libraries or private and public university and college libraries in which pornography is available for study, including on open shelves, shall not be construed to be trafficking in pornography, but special display presentations of pornography in said places is sex discrimination.

b. The formation of private clubs or associations for purposes of trafficking in pornography is illegal and shall be considered a conspiracy to violate the civil rights of women.

c. This paragraph (4) shall not be construed to make isolated passages or isolated parts actionable.

(5) Coercion into pornographic performance: Coercing, intimidating or fraudulently inducing any person, including a man, child or transsexual, into performing for pornography, which injury may date from any appearance or sale of any products of such performance.

a. Proof of the following facts or conditions shall not constitute a defense:

1. That the person is a woman; or

2. That the person is or has been a prostitute; or

3. That the person has attained the age of majority; or

4. That the person is connected by blood or marriage to anyone involved in or related to the making of the pornography; or

5. That the person has previously had, or been thought to have had, sexual rela-

tions with anyone, including anyone involved in or related to the making of the pornography; or

6. That the person has previously posed for sexually explicit pictures for or with anyone, including anyone involved in or related to the making of the pornography at issue; or

7. That anyone else, including a spouse or other relative, has given permission on the person's behalf; or

8. That the person actually consented to a use of the performance that is changed into pornography; or

9. That the person knew that the purpose of the acts or events in question was to make pornography; or

10. That the person demonstrated no resistance or appeared to cooperate actively in the photographic sessions or in the sexual events that produced the pornography; or

11. That the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; or

12. That no physical force, threats, or weapons were used in the making of the pornography; or

13. That the person was paid or otherwise compensated.

(6) Forcing pornography on a person: The forcing of pornography on any woman, man, child or transsexual in any place of employment, in education, in a home, or in any public place.

(7) Assault or physical attack due to pornography: The assault, physical attack, or injury of any woman, man, child, or transsexual in an [sic] way that is directly caused by specific pornography.

(8) Defenses: Where the materials which are the subject matter of a complaint under paragraphs (4), (5), (6), or (7) of this subsection (g) are pornography, it shall not be a defense that the respondent did not know or intend that the materials were pornography or sex discrimination; provided, however, that in the cases under paragraph (g)(4) of section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of section 16-3, no damages or compensation for losses shall be recoverable unless the complainant proves that the respondent knew or had reason to know that the materials were pornography. Provided, further, that it shall be a defense to a complaint under paragraph (g)(4) of section 16-3 that the materials complained of are those covered only by paragraph (q)(6) of section 16-3.

(h) *Education* shall mean the construction, maintenance or operation of any school or educational facility utilized or intended to be utilized for the education or training of persons residing within the territorial jurisdiction of the office and controlled by a public governmental board or agency which operates one or more elementary or secondary schools.

(i) *Employer* shall mean:

(1) Any political subdivison within the county, not represented by the corporation counsel, pursuant to IC 18-4-7-5, and any separate municipal corporation which has territorial jurisdiction primarily within the county; and

(2) Any person who employs at the time of any alleged violation six (6) or more employees within the territorial jurisdiction of the office.

(j) *Employment* shall mean a service performed by an individual for compensation on behalf of an employer, except that such services shall not include the following:

(1) Services performed by an individual who in fact is engaged in an independently established trade, occupation, business or profession, and who has been and will continue to be free from direction or control over the manner of performance of such services;

(2) Services performed by an agent who receives compensation solely upon a commission basis and who controls his/her own time and efforts; or

(3) Services performed by an individual in the employ of his/her spouse, child or parent.

(k) *Employment agency* shall mean and include any person undertaking, with or without compensation, to procure, recruit, refer or place any individual for employment.

(l) *Labor organization* shall mean and include any organization which exists for the purpose, in whole or in part, of collective bargaining or dealing with employers concerning grievances, terms or conditions of employment, or for other mutual aid or protection in relation to employment.

(m) *Lending institution* shall mean any bank, building and loan association, insurance company or other corporation, association, firm or enterprise, the business of which consists in whole or in part in making or guaranteeing loans, secured by real estate or any interest therein.

(n) *Office* shall mean the office of equal opportunity created by this chapter.

(o) *Owner* shall mean and include the title holder of record, a contract purchaser, lessee, sublessee, managing agent or other person having rights of

ownership or possession, or the right to sell, rent or lease real estate.

(p) *Person* shall mean and include one or more individuals, partnerships, associations, organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy. receivers, governmental agencies and other organized groups of persons.

(q) *Pornography* shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

(1) Women are presented as sexual objects who enjoy pain or humilitation; or

(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

(4) Women are presented being penetrated by objects or animals; or

(5) Women are presented in scenarios of degredation [sic], injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual;

(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

The use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section.

(r) *Public accommodation* shall mean an establishment which caters to or offers its services, facilities or goods to the general public.

(s) *Public facility* shall mean any facility or establishment, other than an educational institution, which is owned, operated or managed by or on behalf of a governmental agency.

(t) *Real estate broker* shall mean any person who, for a fee or other valuable consideration, sells, purchases, rents, leases or exchanges, or negotiates or offers or attempts to negotiate the sale, purchase, rental, lease or exchange of real property owned by another person; or a person who is licensed and holds himself/herself out to be engaged in the business of selling, purchasing, renting, leasing or exchanging real property for other persons, or who manages and collects rents for the real property of another.

(u) *Real estate salesperson or agent* shall mean any person employed by a real estate broker to perform or assist in performing any or all of the functions of the real estate broker.

(v) *Respondent* shall mean one or more persons against whom a complaint is filed under this chapter, and who the complaint alleges has committed or is committing a discriminatory practice.

Sec. 16-4. Office of equal opportunity — Created; purpose.

There is hereby created a section of the legal division of the department of administration entitled the office of equal opportunity. This office and its board are empowered as provided in this chapter to carry out the public policy of the state as stated in section 2 of the Indiana Civil Rights Act, within the territorial boundaries of Marion County.

Sec. 16-5. Same — Composition of office; functions.

The office shall be directed by a chief officer who shall also be the affirmative action officer for the city and county. The chief officer shall be appointed by and serve at the pleasure of the mayor and shall be responsible for performing the following functions:

(1) To monitor internal employment practices as follows:

a. By ensuring that city and county government offers equal employment opportunities to persons regardless of race, religion, color, sex, national origin, ancestry, age, handicap, or disabled veteran or Vietnam era veteran status;

b. By providing a vehicle through which employees may seek redress for alleged discriminatory acts by city and county government and/or retaliatory acts by city or county government for filing or assisting in the discrimination complaint process;

c. By establishing affirmative action goals for city and county government;

d. By complying with federal reporting requirements concerning affirmative action and equal opportunity; and

e. By reviewing policies and procedures of the city and the county to eliminate discriminatory practices.

(2) To monitor contract compliance as follows:

a. By ensuring compliance with federal grant requirements respective to the utilization of minority business enterprises (MBE) and women business enterprises (WBE);

b. By reviewing city-county contracts to assure compliance with relevant federal, state and local laws and regulations on affirmative action and equal employment;

c. By functioning as a liaison between the city-county and its contractors by providing technical assistance in developing affirmative action goals and monitoring these compliance efforts to meet established goals; and

d. By managing and implementing the MBE/WBE programs, and by monitoring city and county purchasing as specified in section 16-1(3).

(3) To receive, investigate and adjudicate community complaints as specified in sections 16-18 through 16-28.

Section 16-6. Same — General powers and duties.

In addition to the functions previously mentioned in section 16-5, the office shall have the following powers and duties:

(1) To gather and distribute information for the purpose of improving human relations and removing inequities to protected groups in the areas of housing, recreation, education, employment, law enforcement, vocational guidance and related matters.

(2) To assist other governmental and private agencies, groups and individuals in reducing community tensions and preventing conflicts between persons of different racial, ethnic and religious groups.

(3) To discourage persons from engaging in discriminatory practices through informal methods of persuasion and conciliation and through programs of public information and education.

(4) To furnish techical assistance upon request to persons to assist them in eliminating discriminatory practices or otherwise implementing the policy and purposes of the Indiana Civil Rights Act.

(5) To make such general investigations, studies and surveys as the office shall deem necessary for the performance of its duties.

(6) To prepare and submit at least annually a report of its activities to the mayor and to the public, which

report shall describe the investigations and proceedings conducted by the office, the outcome thereof and the progress and achievements of the office and the community toward elimination of discriminatory practices.

(7) To cooperate with the Indiana State Civil Rights Commission, any appropriate federal, state or local agencies, and with private organizations, individuals and neighborhood associations in order to effectuate the purposes of this chapter and to further compliance with federal, state and local laws and ordinances prohibiting discriminatory practices.

(8) To perform any other duties assigned by ordinance or the mayor.

Sec. 16-7. Equal opportunity advisory board — Created; purpose.

There is hereby created an equal opportunity advisory board empowered as provided in this chapter to carry out the public policy of the state as stated in section 2 of the Indiana Civil Rights Act, within the territorial boundaries of Marion County.

Sec. 16-8. Same — Composition of board; appointment and terms of members.

(1) The board shall consist of twenty-two (22) members. Fourteen (14) members shall be appointed by the mayor and eight (8) members shall be appointed by the city-county council. In addition, the chief officer shall be an ex officio member of the board. In making appointments, the mayor and the city-county council shall consider the following:

(a) No more than seven (7) members of the board appointed by the mayor shall be from any one political party. No more than four (4) members of the board appointed by the city-county council shall be from any one political party.

(b) In making appointments to the board, the mayor and the city-county council shall take into consideration all interests in the community, including but not limited to age, racial, ethnic, sexual, religious and economic groups, business, labor, the handicapped and the general public.

(2) A board member may be removed for just cause, including nonattendance, by a two-thirds (2/3) vote of the board.

(3) In the event of the death, resignation or removal of any member of the board prior to the expiration of his/her term, the appointing authority shall make an appointment to fill the vacancy for the unexpired term of the member.

(4) In making the original appointments to the board, the mayor shall designate five (5) appointees to serve three-year terms; five (5) appointees to serve two-year terms and four (4) appointees to serve one-year terms; and the city-county council shall designate three (3) appointees to serve three-year terms; three (3) appointees to serve two-year terms and two (2) appointees to serve one-year terms. Subsequent appointments shall be for three-year terms beginning on the first day of January and ending three (3) years later on the last day of December. Any member of the board whose term has expired may continue in office until a successor has been appointed.

(5) The mayor shall appoint from the membership of the board, a chairperson who shall serve a one-year term and until his/her successor is appointed and qualified, but serves at the pleasure of the mayor.

(6) The chairperson shall appoint a vice-chairperson and a secretary to serve during his/her term of office.

Sec. 16-9. Same — Meetings; vote required for board action.

The board shall hold regular meetings every two (2) months on a day agreed upon by the board. The board shall

hold special meetings as may be called by two-thirds (2/3) of the membership. One-half (½) of the members of the board, excluding vacancies, shall constitute a quorum at any meeting. A majority vote of those in attendance shall be necessary for action, except in the case of a determination after hearing provided in section 16-26, when a majority of the members of the board not disqualified from participation in such determination shall be required. The chief officer shall not be allowed to vote, except in case of a tie, when the chief officer may cast the deciding vote.

Sec. 16-10. Same — General powers and duties.

The board shall have the following powers and duties:

(1) To appoint an executive committee, a majority of which shall constitute a quorum, which committee shall be authorized to act upon emergency matters between meetings of the board; provided, however, the executive committee shall not take any action inconsistent with action previously taken or policies adopted by the board, and the executive committee shall not exercise any of the powers or functions of the board under sections 16-17 through 16-27. All officers of any executive committee appointed by the board must be members of the board.

(2) To establish three (3) standing committees, composed of seven (7) board members each, to deal with the following subject matter:

a. Internal employment practices,

b. Contract compliance,

c. Complaint adjudication.

The chairperson shall appoint the board members to each committee. No board member shall serve on more than one committee. The chairperson shall be an ex officio member of each committee but have voting privileges only in case of a tie, when

he/she may cast the deciding vote. The board may establish any additional committees as in its judgment will aid the board in effectuating the purposes of this chapter.

(3) To advise the office in formulating policies designed to effectuate the purposes of this chapter and to make such recommendations to the mayor and the city-county council as the board shall deem appropriate to implement such policies.

(4) To adopt, amend and rescind procedural and substantive rules and regulations for the conduct of its affairs, not inconsistent with the provisions or intent and purposes of this chapter, as the board shall deem necessary or appropriate. The rules or regulations shall be adopted only after notice is given and a hearing is held thereon in the manner provided by state law relating to rule-making by state agencies. Any rule or regulation adopted by the board shall be submitted to the corporation counsel for approval as to legality. Upon approval by the corporation counsel, the board shall cause the rule or regulation to be printed or duplicated in such a manner as to be readily available to interested persons and the public, and shall thereupon file the original approved copy and one duplicate with the clerk and the clerk of any other city or town which has adopted this chapter. The rule or regulation shall be effective as of the date and time of filing the original approved copy with the clerk.

(5) To exercise such additional powers or functions as may be delegated to the board by ordinance or by executive order validly adopted and promulgated by the mayor of the consolidated city.

(6) To generally advise the office in the area of equal opportunity which shall include but not be limited to recommending new programs and program objectives, reviewing problem areas and recommending changes in existing programs.

Sec. 16-11. Same — Internal employment practices committee; duties.

(1) A committee on internal employment practices is hereby established. The committee shall be composed of seven (7) members of the board appointed by the chairperson of the board. The committee shall meet quarterly and at such other times as its members deem necessary. The committee shall have the power to establish and adopt rules for the conduct of its affairs.

(2) The duties of the internal employment practices committee shall include:

(a) To review employment policies and procedures of the city and county and make recommendations to eliminate discriminatory employment practices.

(b) To review internal employment programs in the area of equal employment opportunity and affirmative action and make recommendations concerning their effective and efficient operation.

(c) To provide recommendations for establishing and achieving affirmative action goals.

Sec. 16-12. Same — Contract compliance committee; duties.

(1) A committee on contract compliance is hereby established. The committee shall be composed of seven (7) members of the board. The committee shall meet quarterly and at such other times as the members of the committee shall deem necessary. The committee shall have the power to establish and adopt rules for the conduct of its affairs.

(2) The duties of the contract compliance committee shall include:

(a) To review contract compliance procedures and make recommendations concerning their effective and efficient operation.

(b) To make recommendations for improving the

utilization of minority and women businesses by the city and county.

Sec. 16-13. Complaint adjudication; territorial application.

This chapter shall apply within the territorial limits of the consolidated city and within the territorial limits of the county, with respect to any discriminatory practice occurring within such territorial limits and which relates to:

(1) Acquisition of real estate; or

(2) Employment; or

(3) Education controlled by any public board of [sic] agency; or

(4) Public accommodations; or

(5) Pornography.

Sec. 16-14. Unlawful acts other than discriminatory practices; penalty.

(a) It shall be unlawful for any person to discharge, expel or otherwise discriminate against any other person because that person:

(1) Has filed a complaint alleging a violation of section 16-15;

(2) Has testified in a hearing before the board or any committee thereof;

(3) Has otherwise cooperated with the board or office in the performance of their duties and functions;

(4) Has requested assistance from the board or office in connection with any alleged discriminatory practice, whether or not the discriminatory practice was in violation of section 16-15.

(b) It shall be unlawful for any person willfully to file a complaint alleging a violation of section 16-15 with

knowledge that the complaint is false in any material respect.

(c) Any person who violates any of the provisions of this section shall, upon conviction, be subject to fine in an amount not less than ten dollars ($10.00) nor more than three hundred dollars ($300.00); provided, however, no such fine shall be imposed upon any person against whom the board or office has proceedings under this chapter with respect to any violation of subsection (a), which violation is also a discriminatory practice. Any proceeding to impose a penalty under this section shall be commenced within six (6) months after the date the violation occurred.

Sec. 16-15. Discriminatory practices declared unlawful.

Each discriminatory practice as defined in section 16-3 shall be considered unlawful unless it is specifically exempted by this chapter.

Sec. 16-16. Persons and activities to which sections 16-14 and 16-15 do not apply.

(a) Sections 16-14 and 16-15 shall not apply to employment performed for the consolidated city and department or agency thereof, or any employment performed for the county or agency thereof which is represented by the corporation counsel pursuant to IC 18-4-7-5.

(b) Subject to the provisions of section 16-3(g)(4), the provisions of sections 16-14 and 16-15 shall not include any not-for-profit corporation or association organized exclusively for fraternal or religious purposes, nor any school, education, charitable or religious institution owned or conducted by, or affiliated with, a church or religious institution, nor any exclusively social club, corporation or association that is not organized for profit and is not in fact open to the general public.

(c) Sections 16-14 and 16-15 shall not apply to the rental

of rooms in a boardinghouse or rooming house or single-family residential unit; provided, however, the owner of the building unit actually maintains and occupies a unit or room in the building as his/her residence and, at the time of the rental the owner intends to continue to so occupy the unit or room therein for an indefinite period subsequent to the rental.

(d) The following shall not be discrimination on the basis of sex:

(1) For any person to maintain separate restrooms or dressing rooms for the exclusive use of either sex;

(2) For an employer to hire and employ employees; for an employment agency to classify or refer for employment any individual; for a labor organization to classify its membership or to classify or refer for employment any individual; or for an employer, labor organization or joint labor-management committee, controlling apprenticeship or other training or retraining programs, to admit or employ any individual in any such program; on the basis of sex in those certain instances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

Sec. 16-17. Grounds for complaint; persons who may file; persons against whom complaint may be made.

(a) A complaint charging that any person has engaged in or is engaging in a discriminatory practice prohibited by sections 16-14 and/or 16-15 may be filed with the office by any person claiming to be aggrieved by the practice, or by one or more members of the board of employees of the office who have reasonable cause to believe that a violation of sections 16-14 and 16-15 has occurred, in any of the following circumstances:

(1) In the case of the acquisition of real estate, against the owner of the real estate, a real estate broker,

real estate salesperson or agent, or a lending institution or appraiser;

(2) In the case of education, against the governing board of any public school district which operates schools within the territorial limits of the consolidated city or of the county;

(3) In the case of a public accommodation, against the owner or person in charge of any such establishment, or both;

(4) In the case of a public facility, against the governmental body which operates or has jurisdiction over the facility;

(5) In the case of employment, against any employer, employment agency or labor organization;

(6) In the cases of trafficking in pornography, coercion into pornographic performances, and assault or physical attack due to pornography (as provided in section 16-3(g)(7)) against the perpetrator(s), maker(s), seller(s), exhibitor(s), or distributor(s).

(7) In the case of forcing pornography on a person, against the perpetrator(s) and/or institution.

(b) In the case of trafficking in pornography, any woman may file a complaint as a woman acting against the subordination of women and any man, child, or transsexual may file a complaint but must prove injury in the same way that a woman is injured in order to obtain relief under this chapter.

(c) In the case of assault or physical attack due to pornography, compensation for losses or an award of damages shall not be assessed against:

(1) Maker(s), for pornography made.

(2) Distributor(s), for pornography distributed.

(3) Seller(s), for pornography sold, or

(4) Exhibitor(s) for pornography exhibited, prior to the effective date of this act.

Sec. 16-18. Contents of complaint.

To be acceptable by the office, a complaint shall be sufficiently complete so as to reflect properly the full name and address of the complainant or other aggrieved person or persons; the full name and address of the person against whom the complaint is made; the alleged discriminatory practice and a statement of particulars thereof; the date or dates of the alleged discriminatory practice; if the alleged discriminatory practice is of a continuing nature, the dates between which the continuing discriminatory practices are alleged to have occurred; a statement as to any other action, civil or criminal, instituted before any other administrative agency, commission, department or court, whether state or federal, based upon the same grievance alleged in the complaint, with a statement as to the status or disposition of any such other action; and in the case of alleged employment discrimination a statement that the employer employs six (6) or more employees in the territorial jurisdiction of the office.

Sec. 16-19. Execution and verification of complaint.

The original complaint shall be signed and verified before a notary public or other person duly authorized by law to administer oaths and take acknowledgements. Notarial services shall be furnished by the office without charge.

Sec. 16-20. Timeliness of complaint.

No complaint shall be valid unless filed within ninety (90) calendar days from the date of occurrence of the alleged discriminatory practice or, in the case of a continuing discriminatory practice, during the time of the occurrence of the alleged practice; but not more than ninety (90) calendar

days from the date of the most recent alleged discriminatory act.

Sec. 16-21. Referral of complaint to Indiana State Civil Rights Commission.

The chief officer may, in his/her discretion, prior to scheduling of the complaint for hearing under section 16-26, refer any complaint to the Indiana State Civil Rights Commission for proceedings in accordance with the Indiana Civil Rights Act.

Sec. 16-22. Receipt of complaint from Indiana State Civil Rights Commission.

The office is hereby authorized to receive any complaint referred to it by the Indiana State Civil Rights Commission pursuant to section 11a of the Indiana State Civil Rights Act, and to take such action with respect to any such complaint as is authorized or required in the case of a complaint filed under section 16-17.

Sec. 16-23. Service of complaint or respondent; answer.

The chief officer shall cause a copy of the complaint to be served by certified mail upon the respondent, who may file a written response to the complaint at any time prior to the close of proceedings with respect thereto, except as otherwise provided in section 16-26. The complaint and any response received shall not be made public by the chief officer, the board or any member thereof or any agent or employee of the office, unless and until a public hearing is scheduled thereon as provided in section 16-26.

Sec. 16-24. Investigation and conciliation.

(1) *Investigation.* Within ten (10) working days after the receipt of a complaint filed pursuant to this chapter, the chief officer shall initiate an investigation of the alleged

discriminatory practice charged in the complaint. All such investigations shall be made by the office at the direction of the chief officer and may include informal conferences or discussions with any party to the complaint for the purpose of obtaining additional information or attempting to resolve or eliminate the alleged discriminatory practice by conciliation or persuasion. The office shall have the authority to initiate discovery, including but not limited to interrogatories, request for production of documents and subpoenas, on approval of the chief officer at any time within ten (10) working days after filing of a complaint. Any request by the office to compel discovery may be by appropriate petition to the Marion County circuit or superior courts.

(2) *Report of investigation; determination by panel.* Unless the complaint has been satisfactorily resolved prior thereto, the chief officer shall, within thirty (30) working days after the date of filing of a complaint pursuant to section 16-17, report the results of the investigation made pursuant to subsection (1) to a panel of three (3) members of the board designated by the chairperson or vice-chairperson or pursuant to the rules of the board, which panel shall not include any member of the board who initiated the complaint, who might have participated in the investigation of the complaint, or who is a member of the complaint adjudication committee. The chief officer shall make a recommendation as to whether there is reasonable cause to believe that the respondent has violated sections 16-14 and/or 16-15. The chairperson, vice-chairperson or such other member of the panel so designated may, for good cause shown, extend the time for making such report. Such extension thereof shall be evidenced in writing, and the office shall serve a copy of the extension on both the complainant and the respondent. The panel shall then determine by majority vote whether reasonable cause exists to believe that any respondent has violated sections 16-14 and/or 16-15. In making such a determination, the panel

shall consider only the complaint, the response, if any, and the chief officer's report; provided, however, the panel may request the chief officer to make a supplemental investigation and report with respect to any matter which it deems material to such determination.

(3) *Action when violation found.* If the panel, pursuant to subsection (2) determines that reasonable cause exists to believe that any respondent has violated sections 16-14 and/or 16-15, it may direct the chief officer to endeavor to eliminate the alleged discriminatory practice through a conciliation conference. At least one panel member shall be present at any conciliation conference at which both the complainant and respondent are present or represented. If the complaint is satisfactorily resolved through conciliation, the terms of any agreement reached or undertaking given by any party shall be reduced to writing and signed by the complainant, respondent and the chief officer. Any disagreement between the respondent and the chief officer in regard to the terms or conditions of a proposed conciliation agreement may be referred to the panel which considered the complaint, and the decision of the panel with respect to such terms or conditions shall be final for purposes of conciliation proceedings under this subsection, but shall not be binding upon the respondent without his written consent thereto. No action taken or statement made in connection with any proceedings under this subsection, and no written conciliation agreement or any of the terms thereof, shall be made public by the board or any member thereof, or any agent or employee of the officer, without the written consent of the parties, nor shall any such action, statement or agreement be admissible in evidence in any subsequent proceedings; provided, however, the board or officer may institute legal proceedings under this chapter for enforcement of any written agreement or undertaking executed in accordance with this subsection.

Sec. 16-25. Complaint adjudication committee; duties.

A complaint adjudication committee is hereby established. The committee shall be composed of seven (7) members of the board. The committee shall meet for the purpose of holding public hearings on citizens' complaints, which shall be at such times as its members deem necessary.

Sec. 16-26. Hearings, findings and recommendations when conciliation not effected.

(a) *Hearing to be held; notice.* If a complaint filed pursuant to this article has not been satisfactorily resolved within a reasonable time through informal proceedings pursuant to section 16-24, or if the panel investigating the complaint determines that a conciliation conference is inappropriate under the circumstances surrounding the complaint, the complaint adjudication committee may hold a public hearing thereon upon not less than ten (10) working days' written notice to the complainant or other aggrieved person, and to the respondent. If the respondent has not previously filed a written response to the complaint, he/she may file such response and serve a copy thereof upon the complainant and the office not later than five (5) working days prior to the date of the hearing.

(b) *Powers; rights of parties at hearing.* In connection with a hearing held pursuant to subsection (a), the complaint adjudication committee shall have power, upon any matter pertinent to the complaint or response thereto, to subpoena witnesses and compel their attendance; to require the production of pertinent books, papers or other documents; and to administer oaths. The complainant shall have the right to be represented by the chief officer or any attorney of his/her choice. The respondent shall have the right to be represented by an attorney or any other person of his/her choice. The complainant and respondent shall

have the right to appear in person at the hearing, to be represented by an attorney or any other person, to subpoena and compel the attendance of witnesses, and to examine and cross-examine witnesses. The complaint adjudication committee may adopt appropriate rules for the issuance of subpoenas and the conduct of hearings under this section. The complaint adjudication committee and the board shall have the power to enforce discovery and subpoenas by appropriate petition to the Marion County circuit or superior courts.

(c) *Statement of evidence; exceptions; arguments.* Within thirty (30) working days from the close of the hearing, the complaint adjudication committee shall prepare a report containing written recommended findings of fact and conclusions and file such report with the office. A copy of the report shall be furnished to the complainant and respondent, each of whom shall have an opportunity to submit written exceptions within such time as the rules of the complaint adjudication committee shall permit. The complaint adjudication committee may, in its discretion, upon notice to each interested party hear further evidence or argument upon the issues presented by the report and exceptions, if any.

(d) *Findings of fact; sustaining or dismissing complaint.* If, upon the preponderance of the evidence, the committee shall be of the opinion that any respondent has engaged or is engaging in a discriminatory practice in violation of the chapter, it shall state its findings of fact and conclusions and serve a copy thereof upon the complainant and the respondent. In addition, the committee may cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful discriminatory practice and requiring such person to take further affirmative action as will effectuate the purposes of this chapter, including but not limited to the power to restore complainant's losses incurred as a result of discriminatory treatment, as the committee may deem

necessary to assure justice; to require the posting of notice setting forth the public policy of Marion County concerning equal opportunity and respondent's compliance with said policy in places of public accommodations; to require proof of compliance to be filed by respondent at periodic intervals; to require a person who has been found to be in violation of this chapter and who is licensed by a city or county agency authorized to grant a license, to show cause to the licensing agency why his license should not be revoked or suspended. If, upon the preponderance of the evidence, the committee shall be of the opinion that any respondent has not engaged in a discriminatory practice in violation of this chapter it shall state its findings of fact and conclusions and serve a copy thereof upon the complainant and the respondent, and dismiss the complaint. Findings and conclusions made by the committee shall be based solely upon the record of the evidence presented at the hearing.

(e) *Appeal to the board.* Within thirty (30) working days after the issuance of findings and conclusions by the committee, either the complainant or the respondent may file a written appeal of the decision of the committee to the board; however, in the event that the committee requires a respondent to correct or eliminate a discriminatory practice within a time period less than thirty (30) working days, then that respondent must file his/her appeal within that time period. After considering the record of the evidence presented at the hearing and the findings and conclusions of the committee, the board may affirm the decision of the committee and adopt the findings and conclusions of the committee, or it may affirm the decision of the committee and make supplemental findings and conclusions of its own, or it may reverse the decision of the committee and make findings of fact and conclusions to support its decision. The board may also adopt, modify or reverse any relief ordered by the committee. The board must take any of the above actions within thirty (30) working days after the appeal is filed.

(f) *Members of board who are ineligible to participate.* No member of the board who initiated a complaint under this chapter or who participated in the investigation thereof shall participate in any hearing or determination under this section as a member of either a hearing panel, the complaint adjudication committee or of the board.

(g) *Applicability of state law; judicial review.* Except as otherwise specifically provided in this section or in rules adopted by the board or the complaint adjudication committee under this chapter, the applicable provisions of the Administrative Adjudication Act, IC 4-22-1, shall govern the conduct of hearings and determinations under this section, and findings of the board hereunder shall be subject to judicial review as provided in that act.

Sec. 16-27. Court enforcement.

(a) *Institution of action.* In any case where the board or the committee has found that a respondent has engaged in or is engaging in a discriminatory practice in violation of sections 16-14 and/or 16-15, and such respondent has failed to correct or eliminate such discriminatory practice within the time limit prescribed by the board or the committee and the time limit for appeal to the board has elapsed, the board may file in its own name in the Marion County circuit or superior courts a complaint against the respondent for the enforcement of section 16-26. Such complaint may request such temporary or permanent injunctive relief as may be appropriate and such additional affirmative relief or orders as will effectuate the purposes of this chapter and as may be equitable, within the powers and jurisdiction of the court.

(b) *Record of hearing; evidentiary value.* In any action filed pursuant to this section, the board may file with the court a record of the hearing held by the complaint adjudication committee pursuant to section 16-26, which record shall be certified by the secretary of the board as a

true, correct and complete record of the proceedings upon which the findings of the complaint adjudication committee and/or the board were based. The court may, in its discretion, admit any evidence contained in the record as evidence in the action filed under subsection (a), to the extent such evidence would be admissible in court under the rules of evidence if the witness or witnesses were present in court, without limitation upon the right of any party to offer such additional evidence as may be pertinent to the issues and as the court shall, in its discretion, permit.

(c) *Temporary judicial relief upon filing of complaint.* Upon the filing of a complaint pursuant to section 16-17 by a person claiming to be aggrieved, the chief officer, in the name of the board and in accordance with such procedures as the board shall establish by rule, may seek temporary orders for injunctions in the Marion County circuit or superior courts to prevent irreparable harm to the complainant, pending resolution of the complaint by the office, complaint adjudication committee and the board.

(d) *Enforcement of conciliating agreements.* If the board determines that any party to a conciliation agreement approved by the chief officer under section 16-24 has failed or refused to comply with the terms of the agreement, it may file a complaint in the name of the board in the Marion County circuit or superior courts seeking an appropriate decree for the enforcement of the agreement.

(e) *Trial de novo upon finding of sex discrimination related to pornography.* In complaints involving discrimination through pornography, judicial review shall be de novo. Notwithstanding any other provision to the contrary, whenever the board or committee has found that a respondent has engaged in or is engaging in one of the discriminatory practices set forth in paragraph (g)(4) of section 16-3 or as against a seller, exhibitor or distributor under paragraph (g)(7) of section 16-3, the board shall, within ten (10) days after making such finding, file in its own name in the Marion County circuit or superior court an

action for declaratory and/or injunctive relief. The board shall have the burden of proving that the actions of the respondent were in violation of this chapter.

Provided, however, that in any complaint under paragraph (g)(4) of section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of section 16-3 no temporary or permanent injunction shall issue prior to a final judicial determination that said activities of respondent do constitute a discriminatory practice under this chapter.

Provided further, that no temporary or permanent injunction under paragraph (g)(4) of section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of section 16-3 shall extend beyond such material(s) that, having been described with reasonable specificty by the injunction, have been determined to be validly proscribed under the chapter.

Sec. 16-28. Other remedies.

Nothing in this chapter shall affect any person's right to pursue any and all rights and remedies available in any other local, state or federal forum.

INDIANAPOLIS CITY-COUNTY COUNCIL GENERAL ORDINANCE NO. 35, 1984, SECTION 7 & SECTION 8*

SECTION 7. (a) Because this ordinance amends certain provisions adopted in General Ordinance No. 24, 1984, the effective date of that ordinance is postponed until the effective date of this ordinance. (b) The expressed or implied repeal or amendment, by General Ordinance No. 24, 1984, or by this ordinance, of any other ordinance or

* These sections were not included in the codification of Indianapolis City-County General Ordinance No. 35, 1984 in the Code of Indianapolis and Marion County, Indiana, Chapter 16. It is a policy of the Indianapolis City-County Council not to codify sections of ordinances regarding effective dates and severability.

part of any other ordinance does not affect any rights or liabilities accrued, penalties incurred, or proceedings begun prior to the effective date of this ordinance. Those rights, liabilities, and proceedings are continued, and penalties shall be imposed and enforced under the repealed or amended ordinance as if this ordinance or General Ordinance No. 24, 1984, had not been adopted. (c) An offense, committed before the effective date of this ordinance, under any ordinance expressly or impliedly repealed or amended by this ordinance shall be prosecuted and remains punishable under the repealed or amended ordinance as if this ordinance had not been adopted.

SECTION 8. Should any provision (section, paragraph, sentence, clause, or any other portion) of this ordinance be declared by a court of competent jurisdiction to be invalid for any reason, the remaining provisions shall not be affected unless such remaining provisions clearly cannot, without the invalid provision or provisions, be given the effect intended by the council in adopting this ordinance. It is further declared to be the intent of the City-County Council that the ordinance be upheld as applied to the graphic depiction of actual sexual subordination whether or not upheld as applied to material produced without the participation of human subjects nor shall a judicial declaration that any provision (section, paragraph, sentence, clause or any other portion) of this ordinance cannot validly be applied in a particular manner or to a particular case or category of cases affect the validity of that provision (section, paragraph, sentence, clause or any other portion) as applied in other ways or to other categories of cases unless such remaining application would clearly frustrate the Council's intent in adopting this ordinance. To this end, the provisions of this ordinance are severable.